Supreme Court, U.S.
FILED
APR 20 1999
OFFICE OF THE CLERK

No. 99-

In The Supreme Court of the United States

OCTOBER TERM, 1999

GREGORY C. PORTER, *Petitioner,*

v.

UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GUY J. FERRANTE
(Counsel of Record)
KING & EVERHARD, P.C.
Suite 112
450 W. Broad Street
Falls Church, Virginia 22046
(703) 241-8282

Counsel for Petitioner

Of Counsel:

KATHLEEN J. ST. JOHN
KANE ST. JOHN
2900 Delk Road
Suite 700-306
Marietta, Georgia 30067
(770) 850-1175

4499

QUESTIONS PRESENTED FOR REVIEW

1. Should the Board for Corrections of Military Records (BCMR) be permitted to apply a heightened "egregious error" standard in lieu of the long-standing "harmless error" standard adopted in Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979)) (en banc), (cited with approval in Chappell v. Wallace, 426 U.S. 296, 303 (1983)?

2. Congress having relinquished its authority to legislate private bills of relief for servicemembers (2 U.S.C. § 190(g)) and delegated this function to the BCMR (10 U.S.C. § 1552), does 10 U.S.C. § 628 afford discretion to civilian BCMRs to defer to military authorities and to use an insuperable "egregious error" standard in resolving requests for corrections of military records?

3. May the BCMR condition relief upon proof of an "egregious error" when the governing regulatory authority prescribes a "probable material error" standard?

4. Where the scoring procedures of the Air Force's SSBs result in a supercompetitive standard for selection, is it an abuse of discretion for the AFBCMR to substitute an SSB remedy for the traditional correction and backpay remedies afforded under 10 U.S.C. § 1552?

5. May the government or a Court of Appeals rely in any fashion on an apparently fraudulent report of administrative proceedings?

TABLE OF CONTENTS

Page

Opinions Below....3
Jurisdiction....3
Statutory and Regulatory Provisions....4
Statement of the Case....15
Reasons For Granting The Writ....20

I. Porter Affects the Substantial Interest of Large Numbers of Individuals; It Also Represents a Dramatic Break With Precedent....20

II. Porter's Construction of 10 U.S.C. § 628 Violates The Plain Language Rule....28

III. The Harmless Error Standard Does Not Impermissibly Involve Judges and Civilians in Military Matters....33

IV. There Was No Discretion By the AFBCMR to Use an "Egregious Error" Standard Under Section 1552, Given Super-Competitiveness of Selection Board Scoring Procedures; Furthermore, Before Upholding Discretion of AFBCMR to Use an "Egregious Error" Standard Court Should Have Resolved Authenticity and Legality of the Second Addendum....35

Conclusion....39

TABLE OF AUTHORITIES

Cases — Page

Adkins v. United States, 68 F.3d 1317 (Fed. Cir. 1995).....2
Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687 (1995).....29
Bell v. United States, 366 U.S. 393 (1961).....1
Caddington v. United States, 178 F. Supp. 604 (Cl. Ct. 1959).....2, 27
Cornelius v. Nutt, 472 U.S. 648 (1985).....34
Cunningham v. U.S., 39 Fed. Cl. 688 (1998).....21
Darby v. Cisneros, 509 U.S. 137 (1993).....31
Duhon v. United States, 461 F.2d 1278 (Ct. Cl. 1972).....2, 27
Doyle v. United States, 599 F.2d 984 (Ct. Cl. 1979) (en banc)..... 22, 32
Evensen v. United States, 654 F.2d 68 (Ct. Cl. 1981)...22, 34
Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982).....21
Germano v. United States, 26 Cl. Ct. 1446 (1992).....21
Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).....21,33
Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980).....21
King v. United States, 19 Cl. Ct. 703, aff'd per curiam, 918 F.2d 186 (Fed. Cir. 1990).....21
Kotteakos v. United States, 328 U.S. 750 (1946).....23, 34
Laningham v. United States, 5 Cl. Ct. 146 (1984).....35
Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991).....25
Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 286 (1977).....33
Muse v. United States., 21 Cl. Ct. 592 (1990).....21, 27
Orloff v. Willoughby, 345 U.S. 83 (1953).....33

Price v. United States, ___ Fed. Cl. ___
(93-536, Feb. 5, 1999).....26
Proper v. United States, 139 Ct. Cl. 511 (1957).....3, 33
Ray v. United States, 453 F.2d 754 (1972).....35
Riley v. United States, 608 F.2d 441
(Ct. Cl. 1979).....21
Romer v. Evans, 517 U.S. 620 (1996).....2
Sanders v. United States, 594 F.2d 804
(Ct. Cl. 1979).....*passim*
Sharp v. United States, 27 Fed. Cl. 52 (1992).....31
Skaradowski v. United States, 471 F.2d 627 (1973).....27
Skinner v. United States, 594 F.2d 824
(Ct. Cl. 1979).....21,33
Sullivan v. Louisiana, 508 U.S. 275 (1993).....23
Testan v. United States, 424 U.S. 392 (1976).....2
Thompson v. Thompson, 484 U.S. 174.....31
Wotowic-McGill v. United States,
42 Fed. Cl. 318 (1998).....21
Yee v. United States, 512 F.2d 1383
(Ct. Cl. 1975).....2, 27

Statutes Page

2 U.S.C. § 190(g).....2,4,28
10 U.S.C. § 628.....*passim*
10 U.S.C. §§ 631.....20
10 U.S.C. § 632.....20
10 U.S.C. § 1552.....*passim*
28 U.S.C. § 1491.....1
28 U.S.C. § 1295.....1
28 U.S.C. § 1254(1).....3
37 U.S.C. § 204.....20

37 U.S.C. § 206.....20

Regulations Page

32 CFR § 865 (1993).....13
32 C.F.R. § 865.4 (1998).....2, 23
32 C.F.R. § 581.3 (1998).....2, 23
32 C.F.R. §723.3 (1998).....2, 23
34 C.F.R. 831.2 (1949).....3
DoDD 1320.11 (1996).....10, 31
AFR 36-89 ¶ 14 (1992).....11
AFR 36-89 ¶ 16 (1992).....12
AFR 36-89 ¶ 35 (1992).....10

Miscellaneous Page

Russell O. Wheeler, *The Secretary of the Air Force, Correction of Military Records and the Limits of Discretion*, 7 Fed. Cir. Bar J. 193 (1998).....35

In the Supreme Court of the United States

October Term, 1999

GREGORY C. PORTER, *Petitioner,*

v.

UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Gregory C. Porter, a former active-duty Air Force officer, respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

Military pay is a function of statute. Bell v. United States, 366 U.S. 393 (1961). Active duty soldiers have a statutory right to be paid until their service is properly terminated. 37 U.S.C. § 204; Sanders v. United States, 594 F.2d 804, 810 (Ct. Cl. 1979) (en banc). Pursuant to this statute, soldiers have traditionally been able to maintain Tucker Act[1] suits for back pay in their existing grade when improperly separated on the premise that an improper

[1] 28 U.S.C. § 1491. All Tucker Act claims are appealed to the Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295. There will likely never be a split of authority among the circuit courts in a Tucker Act matter.

separation does not terminate the right to continue drawing pay in that grade. Id; Adkins v. United States, 68 F.3d 1317, 1327 (Fed. Cir. 1995). The decision below wrongly extinguishes this long-standing cause of action and replaces it with a claim for pay in a higher grade, in apparent conflict with Testan v. United States, 424 U.S. 392 (1976).

Since their inception, Boards for Correction of Military Records (BCMRs) have had a liberal mandate to do justice and courts have repeatedly recognized that correction boards "have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged [error or] injustice and to take steps to grant thorough and fitting relief." Yee v. United States, 512 F.2d 1383, 1387-1388 (Ct. Cl. 1975), quoting Duhon v. United States, 461 F.2d 1278, 1281 (Ct. Cl. 1972); Caddington v. United States, 178 F. Supp. 604 (Cl. Ct. 1959). The decision below imposes an insuperable "egregious error" standard for correction of records in BCMRs. This standard violates both the long-standing precedents above as well as the governing regulations of all three military departments which prescribe that a military record will be corrected upon showing of "probable material error." 32 C.F.R. § 865.4 (1998) (Air Force); 32 C.F.R. § 581.3 (1998) (Army); 32 C.F.R. §723.3 (1998) (Navy).

In addition, the standard effectively eliminates officers' correction remedy in the civilian BCMR and forces them to seek alternative back pay relief in a military forum. In 1947, Congress passed 2 U.S.C. § 190(g) precluding private bills of relief to servicemembers correcting their military records. As a result of this statute, servicemembers effectively lost their constitutional right of access to the legislative process.[2] Concurrently, Congress passed another statute, 10 U.S.C. §

[2] Cf. Romer v. Evans, 517 U.S. 620 (1996) (statute barring gays access to state legislative process held unconstitutional).

1552, which created boards of civilians (BCMRs) to correct errors. The intent of this statute was to provide a substitute *civilian* forum to redress wrongs and errors by the *military*. Proper v. United States, 139 Ct. Cl. 511, 526 (1957) ("Since the errors or injustices which might require correction were originally made by the military, Congress made it manifest that the correction of those errors and injustices was to be in the hands of civilians."); 34 C.F.R. 831.2 (1949) (10 U.S.C. § 1552 "is construed as a substitute for the correction of military records by Congressional action").

The Court of Appeals' elimination of veterans' substantive pay rights, its imposition of an "egregious error" standard in the BCMR, and its transfer of the BCMR's functions to military officials are completely unwarranted and unsustainable.

Opinions Below

The Court of Appeals' decision reversing the judgment of the Court of Federal Claims, 163 F.3d 1304, is reproduced in the Appendix ("App") at App 1. Its order denying rehearing and declining rehearing en banc is at App. 48. The relevant decisions of the Court of Federal Claims are at App. 50, App. 84, App. 95, and App. 100. The relevant opinions of the AFBCMR are at App. 109, and App. 115. The latter is referred to as the "Second Addendum" and a photocopy of the original has been provided to the Clerk as a lodging with a letter of even date with this filing.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1998). The judgment of the Court of Appeals was entered on November 9, 1998. A timely petition for rehearing was denied on January 20, 1999.

Statutory and Regulatory Provisions

2 U.S.C. § 190(g) provides in pertinent part:

> No private bill or resolution (including so-called omnibus claims or pension bills), and no amendment to any bill or resolution, authorizing or directing . . . (3) the correction of a military or naval record, shall be received or considered in either the Senate or the House of Representatives.

(**NOTE**: Partial repeal of Section 2 of H. Res. 274 of the Ninety-sixth Congress, Nov. 4, 1979, provides that this section, insofar as it relates to the Senate, is repealed. The subject is now governed by the Standing Rules of the Senate, which provides the same result.)

10 U.S.C. § 1552 provides (in pertinent part):

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2) [in certain cases involving enlisted personnel], such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.
>
> . . .

(3) Corrections under this section shall be made under procedures established by the Secretary concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

. . .

(c) The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee . . . .

10 U.S.C. § 628 (1980) (later amended) provided (in pertinent part):

(b)(1) In the case of an officer who is eligible for promotion who was considered for selection for promotion by a selection board but was not selected, the Secretary of the military department concerned, under regulations prescribed by the Secretary of Defense, may convene a special selection board under this subsection . . . to determine whether such officer should be recommended

for promotion if the Secretary concerned determines that--

(A) the action of the board which considered the officer was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the officer as his record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion an officer whose name was referred to it for consideration, the officer incurs no additional failure of selection for promotion.

(c)(1) Each special selection board convened under this section shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing the name of each officer it recommends for promotion and certifying that

the board has carefully considered the record of each officer whose name was referred to it.

(2)The provisions of sections 617(b) and 618 of this title apply to the report and proceedings of a special selection board convened under this section in the same manner as they apply to the report and proceedings of a selection board convened under section 611(a) of this title.

(d)(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer whose name was referred to it for consideration, such officer shall, as soon as practicable, be appointed to the next higher grade in accordance with subsections (b), (c), and (d) of section 624 of this title.

(2) An officer who is promoted to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon such promotion, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him . . . .

10 U.S.C. § 628 (October 17, 1998) provides (in pertinent part):

(b) Persons considered by promotion boards in unfair manner.

(1) If the Secretary of the military department concerned determines, in the case

of a person who was considered for selection for promotion by a promotion board but was not selected, that there was material unfairness with respect to that person, the Secretary may convene a special selection board under this subsection to determine whether that person (whether or not then on active duty) should be recommended for promotion. In order to determine that there was material unfairness, the Secretary must determine that--

(A) the action of the promotion board that considered the person was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the person whose name was referred to it for consideration as that record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration, the person incurs no additional failure of selection for promotion.

. . .

(d) Appointment of persons selected by boards.

(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade a person whose name was referred to it for consideration, that person shall, as soon as practicable, be appointed to that grade in accordance with subsections (b), (c), and (d) of section 624 of this title. However, in the case of a board convened under this section to consider a warrant officer or former warrant officer, if the report of that board, as approved by the Secretary concerned, recommends that warrant officer or former warrant officer for promotion to the next higher grade, that person shall, as soon as practicable, be appointed to the next higher grade in accordance with provisions of section 578(c) of this title (rather than subsections (b), (c), and (d) of section 624 of this title).

(2) A person who is appointed to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon that appointment, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him. In the case of a person who is not on the active-duty

list when appointed to the next higher grade, placement of that person on the active-duty list pursuant to the preceding sentence shall be only for purposes of determination of eligibility of that person for consideration for promotion by any subsequent special selection board under this section.

. . .

(f) Convening of boards. A board convened under this section--(1) shall be convened under regulations prescribed by the Secretary of Defense . . . .

Department of Defense Directive (DoDD) 1320.11 (1996) provides (in pertinent part):

DEFINITIONS

4. Special Selection Board. . . . Special Selection Boards make select and nonselect recommendations, as distinguished from providing advisory opinions as to whether an officer would have been selected had an officer been properly considered by the original board.

AFR 36-89 ¶ 35 (1992) provides (in pertinent part):

(b) An SSB will consider the record of the officer as it would have appeared to the original board had the officer been properly considered. The officer's record will be compared with benchmark records from the original board (paragraph 16).

(c) SSBs will use the scoring procedures outlined in paragraph 14.

(d) The applicant will be selected if the SSB finds the applicant fully qualified for promotion and if his or her record scores higher than all the nonselect records and ties at least one of the selected records from the original board.

AFR 36-89 ¶ 14 (1992) provides in pertinent part:

(b)(3)Board members will score records by secret ballot, that is, without benefit of discussion, unless a significant difference (a split) occurs in the scores given a particular record (subparagraph e). Board members may request to discuss records that did not split. The board president may approve or disapprove such requests. . . .

(d) Scoring Scale:

(1) For board or competitive categories with quotas less than 100 percent, the following scoring scale will be used:

10.0	Absolutely superior
9.5	Outstanding record
9.0	Few could be better
8.5	Strong record
8.0	Slightly above average
7.5	Average
7.0	Slightly below average
6.5	Well below average
6.0	Lowest in potential

e. Scoring Splits:

(1) As board members complete their scoring on a particular record, the administrative staff will review the scores to determine if any significant differences exist between the scores of a given record.

(2) A significant difference, or a split, is defined as a difference of more than one and a half points between any two scores on a record: for example, 6 and 8, or 8 and 10. . .

(3) When a split occurs in the scoring of an officer's record, the board members may discuss the record and may change their scores or votes as required to resolve the split. Discussion must be constrained as explained in subparagraph b(3). Board members may request to reconsider their scoring of records which did not split. The board president may approve or disapprove such requests.

f. Identifying the "Gray." During the board, the administrative staff will record the board members' scores in a computerized score file, produce preliminary scoring runs (a cumulative order of merit fore each panel), and verify the accuracy of the file. "Gray" occurs on an order of merit when the quota line (the selection percentage) falls among officers who have the same score.

AFR 36-89 ¶ 16 (1992) provides (in pertinent part):

On adjournment of the board, recorders will collect all score rosters, internal working papers, etc. Board members will not be allowed to retain any documents. Following approval of the board's results by the Assistant Secretary of Defense (Force Management and Personnel), the recorders will destroy all score rosters and internal working papers associated with the board that are not part of the board record. Before destroying the score rosters, five records from among the lower scoring selects and five records from among the highest scoring nonselects . . . will be identified. This sample of records, called benchmark records, will be used if special selection boards (SSBs) are required.

32 CFR § 865 (1993) (found at 50 Fed. Reg. 36426 *et seq.*) provides (in pertinent part):

Subpart A--Air Force Board for Correction of Military Records

. . .

§ 865.3 Function of the board.

The function of the Board is to consider all applications properly before it to determine the existence of an error or an injustice and, when appropriate, to make recommendations to the Secretary of the Air Force.

§ 865.4 Board jurisdiction.

The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

§ 865.9 Consideration of application.

Denial of Application. The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him or her, that effective relief cannot be granted, or that the applicant did not file his or her application within 3 years after he or she discovered or reasonably could have discovered the alleged error or injustice . . .

§ 865.14 Access to Records

(a) *Official Records.* the applicant will have access to all records considered by the Board with the exception of any classified and privileged matter contained therein.

§ 865.18 Deliberations, findings, decisions, and recommendations

(a) *Deliberations*. Only members of the Board and its staff will be present during the deliberations of the Board.

(b) *Further Information*. During the course of review of the case, when it appears to the Board's satisfaction that the facts have not been fully and fairly disclosed by the records or by the testimony and other evidence before the Board, the Board may require the applicant to obtain, or the Board may obtain, such further information as it may consider essential to a complete and impartial determination of the facts and issues. The applicant will have access to evidence developed by the Board on its own motion in accordance with § 865.14 and may submit additional comments with regard to the evidence.

(c) *Findings, Decisions, and Recommendations*. Following a hearing the Board will make written findings, decisions, and recommendations. A majority vote of the members present on any matter before the Board will constitute the action of the Board and will be so recorded.

§ 865.20 Record of Proceedings.

When the Board has completed its deliberations, a record of proceedings will be prepared. Such a record will indicate whether or not a quorum was present and the name and vote of each member present. The record of proceedings will include the application for relief, briefs and written arguments; advisory opinions; the findings, conclusions, and recommendations of the Board; and all other papers, documents, and reports necessary to reflect a true and complete history of the proceedings. The Report will also include a transcript of testimony and any minority reports. The record so prepared will be certified as true and compete by the signature of the panel chairman or designee.

Statement of the Case

Petitioner was separated from active duty as a sole and direct consequence of being nonselected for promotion by two promotion boards. 10 U.S.C. § 631. In his records were derogatory comments and evaluations and false duty titles. Petitioner filed an application for correction of military records in 1984 alleging that his frequently-drunk rating supervisor set him up to take a fall for the supervisor's drinking buddy. In 1985, the AFBCMR found error in Petitioner's record, made a partial correction, and referred his (still) erroneous records to two special selection boards (SSBs) so that he could be reconsidered for promotion. Petitioner's SSBs convened in 1986 and nonselected him.

Petitioner filed another application in the AFBCMR in 1988 and a request for reconsideration in 1990. Unsuccessful in these endeavors, Petitioner filed a wrongful separation suit in the Court of Federal Claims, *pro se,* for correction of his record errors, voidance of his promotion passovers, constructive reinstatement, and back pay pursuant to 37 U.S.C. § 204.

The Court of Federal Claims (the "Trial Court") noted that there appeared to be material errors in Petitioner's promotion board record, as reviewed by both the regular promotion boards and the 1986 SSBs. App. 62-70. After determining that the AFBCMR record contained no evidence[3] to support a harmless error finding, the Trial

---

[3] With respect to the error which the AFBCMR had corrected in 1985, that court noted that the AFBCMR found that Petitioner's submission was "'sufficient to overcome the rationale expressed by the Air Staff [that Porter would not have been promoted in any event].'" App. 52. With respect to the still uncorrected errors in Petitioner's record, the court stated: "Not having conceded the OER or OSB errors, neither the AFBCMR nor the government, understandably, has made any attempt to present facts or grounds sufficient for determining that, even with the

Court reminded the Air Force that it had the ultimate burden of showing harmlessness. App. 70. The Trial Court ordered the AFBCMR to make a "harmless error" determination and it specified that the AFBCMR had to make these determinations *itself*. App. 78.

On remand, the AFBCMR corrected the remaining errors in Petitioner's promotion board records. The Air Force proffered no evidence[4] and the AFBCMR made no "harmless error" determination. Instead, the AFBCMR required Petitioner to satisfy a "no doubt of selection" standard for an AFBCMR-directed promotion. App. 113. The AFBCMR then recommended that Petitioner's record be reconsidered by two new SSBs and made all further relief contingent upon the SSBs:

> If the applicant is nonselected by the SSBs, no further action will be required on his application. However, if he is selected for promotion, the applicant will be provided the opportunity to request reinstatement in the Air Force and his request will be considered by the Board.

App. 113.

Two new SSBs, convened in November 1993, non-selected Petitioner. Petitioner received a letter from the Air Force Military Personnel Center stating, "The SSB determined that had your corrected records been considered by the original boards, you would not have been selected for

---

errors, the SSB would have reached the same decision regarding Mr. Porter's likelihood of promotion by the original selection boards." App. 70.

[4] The exhibits before the AFBCMR are listed on the last page of the 1993 Report of Proceedings (ROP) (App. 114) and are described in the text of the ROP. They consist of the administrative record from the AFBCMR's earlier proceedings (1985, 1989, and 1990) and the court's 1992 Order.

promotion." *Letter from Steven M. Sheehan to Gregory C. Porter, dated 26 Jan 94.* The case then returned to the Trial Court.

In the Trial Court, the government moved for summary judgment, arguing that the Petitioner's SSB non-selections established harmless error. The Trial Court denied the government's motion (App. 84) for two principal reasons. First, very early in the litigation, the Air Force had admitted that its SSBs were potentially more competitive than the original board. App. 52-53 n4, App. 74 (text and n18). In addition, the Court observed that the Air Force's scoring regulation imposed a manifestly supercompetitive standard. App. 92 n4. Thus, as a factual matter, SSBs did not measure harm in the original promotion board.[5] The Trial Court's second reason for denying the government's summary judgment motion was that military SSBs cannot perform the functions of the civilian BCMR under the BCMR's enabling statute, 10 U.S.C. § 1552. App. 91.

Based on the foregoing, the Trial Court concluded that Petitioner's promotion passovers must be voided. An additional reason for this decision, articulated in a clarification order dated Dec. 30, 1994 (App. 95), was the Trial Court's view that 10 U.S.C. § 628 (1980) authorized SSB consideration only for an "officer"--meaning that a former officer had to be reinstated before meeting an SSB.

The Trial Court's October 1994 Order (App 84) compelled the Air Force to void Petitioner's promotion passovers and to constructively reinstate him. The order also remanded to the AFBCMR one last time to determine

---

[5] The Trial Court held that this did not violate the SSB enabling statute, 10 U.S.C. § 628, because that statute required only that the Petitioner's record be compared with a "sampling" of records from the original board. App. 88.

whether Petitioner's 1993 SSBs had been infected with procedural error.

In response to this remand order, a document known as "the Second Addendum" was created by the government. App. 115 (a lodging of a copy of the original has also been filed.) The Second Addendum responded to the Court's October 1994 Order. The Second Addendum also offered a rebuttal to the Court's legal and factual analysis, which was contrary to the legal and factual positions of the government up to that point in the proceeding. Of particular interest was a conclusory and unsupported[6] statement in the Second Addendum that the Air Force's SSB procedures were not supercompetitive. The Second Addendum was filed in the Trial Court, but the government filed no motion to reconsider the court's reinstatement and back pay order and the court did not reconsider that order. App. 100.

The government appealed. Petitioner did not cross-appeal the decision of the lower court that his SSBs conformed with 10 U.S.C. § 628. He was not concerned with whether or not a supercompetitive SSB process violated Section 628 and he did not want to be promoted by an SSB. Instead, he believed as the lower court did, that the Air Force's supercompetitive SSB process made it inappropriate under Section 1552 for the Air Force to abandon Sanders and to make his reinstatement claims depend on the determinations of supercompetitive military SSBs.

The government's position on appeal mirrored the Second Addendum, both factually and legally. Petitioner filed a *Motion to Remand to Supplement the Record* so that the provenance of the Second Addendum could be

---

[6] The records supporting the Second Addendum are listed on its last page. The government's submissions during that proceeding are included at App. 135-147. A review of these documents reveals that they do not address supercompetitiveness of the SSBs.

ascertained. Petitioner maintained that the Second Addendum was facially irregular in ways that suggested that it was not a genuine product of the BCMR and was, instead generated *ex parte*, solely for litigation. In an order dated September 30, 1997, the Court of Appeals (Newman J.) denied Petitioner's motion on the ground that such a motion should have been included in his Response brief. Then, noting that Petitioner was *pro se* at the time of that filing, the Court vacated Petitioner's Response brief with leave to file a new Response and to include the remand motion therein.

Petitioner's *Brief for the Plaintiff-Appellee*, dated November 17, 1997, included a conditional motion to remand. App. 148-87. This motion requested that the Court not "rely" upon the Second Addendum unless it first remanded to determine its provenance. The government declined to respond to the merits of Petitioner's allegations.

In its decision of November 9, 1998 (App. 1), the Court of Appeals framed Petitioner's motion as a motion concerned solely with "deference" to the government's legal position and denied it on that basis. App 47 n 2. The Court then reversed the judgment of the lower court and, for the first time, held that after the enactment of 10 U.S.C. § 628 (1980), the Sanders "harmless error" standard was not controlling in cases where an officer met an SSB. The Court further reasoned that the Second Addendum afforded Petitioner all of the rights to which he was entitled under 10 U.S.C. § 1552. App. 45.

While the case was pending in the Court of Appeals, Congress passed an amendment to Section 628, *supra* at 7, which codified the Air Force's practice of convening SSBs for former officers. Thus, one of the justifications for the lower court's decision--the need to reinstate an officer prior to convening an SSB--no longer applies. The issues that are

raised in this Petition are equally pertinent to both the old Section 628 and the new Section 628.

Petitioner filed a petition for rehearing and a suggestion for rehearing in banc, which were denied on January 20, 1999. App. 48.

Reasons For Granting The Writ

I. Porter Affects the Substantial Interest of Large Numbers of Individuals; It Also Represents a Dramatic Break With Precedent

Active duty[7] officers have an enormous personal stake in continuing their active duty service. This is partly because the all-or-nothing retirement and benefits system does not vest until the twentieth year.

The most common mechanism for separating officers prior to retirement eligibility is the so-called "up-or-out" provisions of 10 U.S.C. §§ 631 and 632, which were used to separate the Petitioner. App 51. These "up-or-out" provisions authorize the involuntary separation of officers if they are twice passed over (nonselected) by promotion selection boards.

The "up-or-out" system is not perfect and when it fails, the effects are devastating, both financially and

---

[7] Active duty officers fall under the provisions of the Defense Officer Personnel Management Act, set forth in Title 10, Chapter 36. The pay rights of all active duty officers (including active duty reservists) are determined under 37 U.S.C. § 204, which creates a substantive right of payment until active duty status has been properly terminated. Sargisson, 913 F.2d 918, 920 (1990). Reserve officers who are not on active duty are covered under a different statutory scheme, the Reserve Officer Personnel Management Act and, except in very limited circumstances, their pay rights are determined under 37 U.S.C. § 206. 37 U.S.C. § 206 allows for pay only if an officer has actually performed his duties.

psychologically. Historically, the most common way for the "up-or-out" system to break down is the way it broke down in Petitioner's case--the officer's record goes to a promotion board with material error in it. Each year, many hundreds (if not thousands) of active duty officers like the Petitioner file applications in the services' BCMRs, complaining of this type of error and requesting correction (voidance) of their promotion passovers. Porter affects all of these cases.

Prior to Porter, a complaint of this type was governed by Sanders, 594 F.2d 804, and its progeny. Under these pre-Porter cases, requests for correction of a promotion passover due to errors in an officer's promotion board records were considered to be meritorious if 1) the officer showed that probable material error existed in his records, 2) the officer showed that the error made his records look worse than they would have without the error, and 3) the government was unable to prove that the error was harmless (i.e., that he would likely have not been promoted in any event). Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982); Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980). In such meritorious cases, courts recognized a dual remedy.[8] One remedy was the correction (deletion) of the passover(s) giving rise to the officer's involuntary separation. Deletion of passovers results in constructive reinstatement and back pay in the officer's current grade, based on officers' substantive right under a pay-mandating statute to draw pay

---

[8] E.g., Sanders, 594 F.2d 804; Skinner v. U.S., 594 F.2d 824 (Ct. Cl. 1979); Riley v. U.S., 608 F.2d 441 (Ct. Cl. 1979) Engels v. U. S., 678 F.2d 173; Hary v. U.S., 618 F.2d 704 (Ct. Cl. 1980); Grieg v. U.S., 640 F.2d 1261 (Ct. Cl. 1981); King v. U.S., 19 Cl. Ct. 703, aff'd per curiam, 918 F.2d 186 (Fed. Cir. 1990); Muse v. U.S., 21 Cl. Ct. 592 (1990); Germano v. U.S., 26 Cl. Ct. 1446 (1992), (cited with approval in 7 A.L.R. Fed 473 Supp. 4); Cunningham v. U.S., 39 Fed. Cl. 688 (1998); Wotowic-McGill v. U.S., 42 Fed. Cl. 318 (1998).

until properly separated. 37 U.S.C. § 204; Sanders, 594 F.2d at 810.

A second (additional) remedy was promotion reconsideration with a corrected record. This remedy has been available since 1980 through special military selection boards (SSBs) convened under 10 U.S.C. § 628. Prior to 1980, retrospective promotion reconsideration was provided pursuant to the Service Secretaries' implied authority. Doyle v. United States, 599 F.2d 984, 1000 (Ct. Cl. 1979) (en banc); see also Evensen v. United States, 654 F.2d 68 (Ct. Cl. 1981).

The duality of the historically-available remedy reflects the fundamental principle that, even in an "up or out" system, promotion and separation are separate and distinct concepts. Sanders, 594 F.2d at 816 (improper to focus attention on plaintiff's promotion rather than on the propriety of plaintiff's separation).

The primary issue in this case is the continuing viability of Sanders and the impact of Porter on officers' substantive and procedural rights under 37 U.S.C. § 204 and 10 U.S.C. § 1552. Porter holds that the Sanders "harmless error" standard, which has been the judicial standard in promotion passover cases since 1979, has been defunct since the passage of 10 U.S.C. § 628 (1980). App. 42. Under Porter, the BCMR is permitted to defer a determination whether to correct an officer's promotion passovers until after it convenes a military SSB.[9] In the event that the officer is nonselected by an SSB, the SSB nonselection relates back to and takes the place of the flawed non-selection by the original board. App. 24-25. Porter is a landmark decision. It is the first military pay case (apart from courts martial which

[9] Petitioner has no objection to the general proposition that a BCMR may convene an SSB before considering whether to void an officer's promotion passover.

are governed by an express statute) in which a new proceeding or decision has related back to the date of the original wrong. Cf. Sanders, 594 F. at 810 (promotion passovers by specially convened promotion boards do not relate back because of officers' right to draw pay until properly separated).

As a result of this relation-back, the question before the BCMR is no longer focused on the officer's original passover because that has been superseded by the SSB passover. Instead, the BCMR's inquiry is whether the *SSB* was defective under 10 U.S.C. § 628. In addition to shifting the focus of the BCMR's inquiry away from the original selection board process to the SSB, Porter drastically changes the standard for challenging both the original and the SSB promotion passover.

Prior to Porter, the standard for the correction of a promotion passover in the vast majority of cases was "harmless error." Sanders, 594 F.2d 804; see also 32 C.F.R. § 865.4 (1998) (Air Force); 32 C.F.R. § 581.3 (1998) (Army); 32 C.F.R. §723.3 (1998) (Navy). In a few military pay cases, courts have found that the error was so fundamental to the promotion process that it defied harmless error analysis. Doyle, 599 F.2d 984, was one such case. In Doyle, the en banc Court of Claims found that the Army's selection boards did not have the statutorily-required number of reserve members. Finding that it had no way to assess the impact of this error, the court held that the error was *per se* harmful. The *per se* harm (or fundamental error) rule was, until Porter, viewed as an exception to the harmless error rule in military cases in the same way that a case like Sullivan v. Louisiana, 508 U.S. 275 (1993) (absence of jury finding precludes harmless error analysis) would be viewed as an exception to the "harmless error" rule in criminal trials.

What Porter does is substitute the *exception* to the harmless error rule for the harmless error rule itself. Thus, officers are no longer entitled to deletions of their promotion passovers upon a showing of "harmful error;" they must show, instead, that there is no doubt about harmfulness[10] or that the error defies a harmless error analysis and, thus, justifies a categorical finding of harm.[11] The equivalent in a trial context would be if this Court overruled Kotteakos v. United States, 328 U.S. 750 (1946), and required all aggrieved litigants to prove that the error in their trials was so egregious that its effect could not or need not be weighed by the court.

The impact of Porter's extraordinary "relation-back" doctrine and an insuperable "egregious error" standard is three-fold. First, the relation-back of the SSB non-selection to the date of the original board eliminates the principle that active duty officers are entitled to be paid in their current grade until properly separated. See Sanders, 594 F.2d at 810.

Second, the imposition of an insuperable standard for corrections of promotion passovers effectively terminates the traditional right to draw pay in one's current grade. When an officer has been separated due to errors in the way that he was considered for promotion, he must obtain a correction (or deletion) of his passovers in order to draw pay

---

[10] In the *Reply Brief for Defendant-Appellant*, Dec. 4, 1997, at 7 the Air Force articulated the AFBCMR's standard as follows: "If the AFBCMR further discovers that the discovered 'error' is so egregious that it undoubtedly resulted in the applicant's initial non-selection (e.g., applicant's military record contained another officer's disciplinary action report), the board may sua sponte void the initial promotion non-selections . . . ."

[11] Porter also states that nothing prevents the AFBCMR from considering "other material errors that might be involved in an SSB consideration." App. 41. In light of the Court's holding that BCMR's may impose an "egregious error" standard for correction of a promotion passover, this should not be read as meaning that the AFBCMR will void a promotion passover in the event of material error.

under 37 U.S.C. § 204. See Mitchell v. United States, 930 F.2d 893 (Fed. Cir. 1991). In Sanders, the en banc Court of Claims examined the issue whether it was an abuse of discretion for the AFBCMR to apply a "but for" standard to corrections of records. The Court held that such a standard did constitute an abuse because, "It would be all but impossible for a serviceman to prove he would have been promoted but for defendant's error. Thus, the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place." 594 F.2d at 816. The "egregious error" standard adopted in Porter is subject to the very same objections as the "but for" standard. It is calculated to deny relief in meritorious cases and to give the wrongdoing party (here, the Air Force) the benefit of uncertainty in the proof process.

A third effect of Porter is that its insuperable standard for correction forces the officer to pursue alternative relief under 10 U.S.C. § 628. Section 628 authorizes Service Secretaries to convene special selection boards composed of military officers for the purpose of recommending officers for promotion. Section 628 is, doubtless, a fine mechanism for vindicating an officer's (non)right to promotion. It is, however, a very poor substitute for the traditional right to a record correction in the BCMR.

The BCMR is composed of civilians who operate by majority decision and whose votes are recorded. The BCMR's decisions must be supported with reasons and must be supported by substantial evidence. They are also subject to judicial review. The SSB, by contrast is military. There is no majority consensus; the outcome is determined mathematically from the members' individual secret scores. AFR 36-89 ¶¶ 35, 14. There is no possible review of its substantive decisions because its deliberations are secret and

the members' reasoning is private. Price v. United States, __ Fed. Cl. ___ (93-536, Feb. 5, 1999).

Porter's elimination of veterans' rights under 10 U.S.C. § 1552 results in a substantial deprivation for which Section 628 provides no recompense. The losses imposed by Porter, however, do not fall entirely on servicemembers. They will also fall on Congress.

Consistent with Congress' intent to provide servicemembers with meaningful civilian-directed relief, decisions prior to Porter have emphasized the duty of BCMRs to grant full and fair relief. As stated in Sanders,

> Congress conferred broad powers on the Secretaries to remedy errors and injustices. Congress, in so doing, voluntarily and explicitly relinquished its authority in this area and terminated servicemen's access to Congress for correction of military records by way of private bill. 2 U.S.C. § 190g. The conjunction of these statutes implies that the Secretaries have a duty as well as the power to afford servicemen proper relief. . . . The Secretaries, acting through correction boards, have the authority and duty to correct records in order to correct an error or remove an injustice and to pay money found to be due when payment is necessary to correct a particular error or injustice. We have reviewed correction board actions in terms of the liberal mandate of the statute to correct errors and remove injustices, and failure to follow the purpose of the statute has been remedied in this court, a practice sanctioned by our decisions for over two decades, with no complaint from Congress.

594 F.2d at 812. This view was echoed in Yee v. United States, 512 F.2d 1383, 1387 (Ct. Cl. 1975). "When a correction board fails to correct an injustice [and/or an error] clearly presented in the record before it, it is acting in violation of its mandate." See also Skaradowski v. United States, 471 F.2d 627, 628 (1973); Duhon v. United States, 461 F.2d 1278, 1281 (1972).

In Muse v. United States, 21 Cl. Ct. 592 (1990), an Army officer met SSBs then subsequently pursued a back pay remedy. In that case, the court correctly understood its mandate:

> What is absolutely critical here is that the correction board comply with the admonition in Sanders which emphatically provides that --". . . . where an applicant has convinced a correction board to correct his record it must not grant him 'half-a-loaf' of relief." 219 Ct. Cl. at 301, 594 F.2d at 813 (citation omitted). Moreover, the Court of Claims has repeatedly stated that "military correction boards 'have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged [error or] injustice and to take steps to grant thorough and fitting relief.'" Yee, 206 Ct. Cl. at 398, 512 F.2d at 1387-1388, quoting Duhon, 198 Ct. Cl. at 570, 461 F.2d at 1281; and Caddington v. United States, 147 Ct. Cl. 629, 634, 178 F. Supp. 604 (1959), cited with approval in Sanders, 219 Ct. Cl. at 301, 594 F.2d at 814. Thus, it is within the bounds of the above-stated principles that we must determine -- whether the ABCMR acted arbitrarily, capriciously . . . .

21 Cl. Ct. at 603.

In contrast to the foregoing decisions, Porter did not seem to weigh any of the detriments that would be borne by veterans as a result of the decision; nor did it appear to give any substantial weight to Congress' intent under Sections 1552 and 190(g). Further, as the following will show, Porter was based on a misreading of Section 628.

II. Porter's Construction of 10 U.S.C. § 628 Violates The Plain Language Rule

The linchpin of the Court of Appeals' analysis is 10 U.S.C. § 628(b)(3). This subsection (identical in both the old and new statute) provides:

> If a special selection board convened under paragraph (1) does not recommend for promotion a person whose name was referred to it for consideration, the person incurs no additional failure of selection for promotion.

Infra, at 6-7. According to the Court, this passage means that, unless an officer's promotion passovers are voided before an SSB is convened, an SSB non-selection *relates back* in time to the date of the original proceeding. The importance of this holding cannot be overstated. If an SSB nonselection relates back (as opposed to simply having no effect on the original non-selections), the officer must challenge his *SSB* non-selection before he can assert any claim based upon the errors in his *original* selection board. Thus, under Porter, after an SSB is convened and the officer is non-selected, the officer must show *two* things in order to obtain back pay relief in his current grade. First, he must show that his SSB non-selections were void under 10 U.S.C. § 628; then he must establish that the AFBCMR's initial decision not to void his *original* promotion passovers was incorrect. If at any time, an officer obtains new SSBs as a remedy for errors

in an earlier board, any non-selections by these new SSBs will also relate back and extinguish the officer's rights of pay.

Because of the above, Porter holds that after an officer is non-selected by an SSB, the focus of his original request to be reinstated because of errors in his original board proceeding is whether the *SSBs* were valid under Section 628. This is because, unless the officer can show that his SSBs are void, his initial application for correction of his original passovers is moot.

As the following will show, the Court's construction of Section 628(b)(3) and its conclusion that SSB nonselections "relate back" is not supported by the plain language of the statute.

Statutes must be interpreted according to their plain terms. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 697 (1995). The statutory language of subsection (b)(3)--"incurs no additional failure of selection"-- does not mean "incurs a failure of selection which relates back to and takes the place of the original non-selection." It means that the SSB nonselections will not be added to any nonselections by the original board. Thus, if an officer's original passover has been voided, a subsequent SSB non-selection will count (not retroactively, but as of the date the SSB nonselection actually occurs). If an officer's original passover has not been voided, then the SSBs non-selection is not incurred because it is an "additional failure of selection." (If at a later date, however, the original passover were voided, the SSB non-selection would no longer be "additional" and it would count.)

The analytical process by which the Court of Appeals reached its erroneous construction of Section 628(b)(3) is reflected in the Court's opinion and it, too, is erroneous. First, the Court examined the legislative history of Section 628. One sentence stood out, which in the Court's mind

meant that Congress intended for SSB non-selections to have retroactive effect: "The purpose of this subsection is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error. H.R. Rep. No. 96-1462, at 74 (1980)." App. 24. The Court then looked to the statute for confirmation of its view:

> The retroactive nature of an SSB's inquiry, as suggested by this legislative history, is confirmed by the text of section 628(b)(2), which specifies that an SSB considers the record of the officer as his record, if corrected, would have appeared to the board that considered him [and passed him over]. Further, the same statutory provision requires the SSB to compare the officer's record with a sampling of records of officers selected and not selected for promotion by the previous selection board. 10 U.S.C. § 628(b)(2). Even more evidence of the nunc pro tunc nature of the SSB deliberation is found in the provision that protects an officer passed over by an SSB from any additional failure of selection for promotion (unless, of course. . . the officer's initial passover is voided before his record is considered by an SSB). 10 U.S.C. § 628(b)(3). Finally, subsection (d)(2) provides that the consequences of a selection decision by an SSB relate back to the date of the selection board decision that passed the officer over. This subsection states that the officer who prevails before an SSB shall have the same position on the active duty list with the requisite pay and benefits that accrue to the rank to which the officer is promoted as a result of the SSB decision. 10 U.S.C. § 628(d)(2). As a whole, we think it is clear that

> Congress intended: (1) an SSB's decision to relate back to the date of the original selection board's decision; and (2) for the SSB's decision to stand in place of the earlier selection board decision.

App. 24 (emphasis added). This analytical process is backwards. In construing a statute, one must first examine the plain language of the statute and determine its plain meaning. One does not, through a process of eisegesis, begin with the legislative history then seek confirmation of one's view of the legislative history in the statute. Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history ... is unnecessary in light of the plain meaning of the statutory text."); Sharp v. United States, 27 Fed. Cl. 52, 59 (1992), citing Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (committee reports are not good indicators of full legislature's will).

The plain language of Section 628(b)(1) states that a Secretary may convene an SSB for an officer "to determine whether such officer should be recommended for promotion." In similar fashion, the new version of Section 628(b)(1) reads that SSBs may be convened "to determine whether that person (whether or not then on active duty) should be recommended for promotion." Accord, DoDD 1320.11 ¶ 8 (1996) (Section 628 "specifically authorize[s] Special Selection Boards for Promotion Purposes Only"); Id, Definitions, ¶4 ("Special Selection Boards make select and nonselect recommendations, as distinguished from providing advisory opinions as to whether an officer would have been selected had an officer been properly considered by the original board.")

Reading the statute first puts the legislative history in its proper context. *In determining whether an officer*

should be recommended for promotion by an SSB, "the purpose of [subsection 628(b)] is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error." In context, there is absolutely nothing in the legislative history that would suggest a Congressional intent to eliminate officers' reinstatement remedies in the BCMR.

When Section 628 is read as a promotion board statute and without any assumption of a larger Congressional purpose, it is apparent that Section 628(b)(3) is nothing more than a codification of the rule already established in the courts at the time Section 628 was passed. Prior to Section 628, promotions resulting from selections by specially convened promotion boards related back to the date of the original board, just as in Section 628(d)(2). Doyle , 599 F.2d at 1000. The rule for nonselections, however, was otherwise. Sanders, 594 F.2d at 810 (promotion passovers by specially convened promotion boards do not relate back because of officers' right to draw pay until properly separated).

In sum, the statutory foundation for the Court of Appeals' analysis is faulty. The result is a decision that cannot be sustained on any statutory ground. The sole remaining argument of the Court of Appeals is its discomfort with the "harmless error" standard. Properly applied, however, the harmless error standard does not impermissibly involve judges and civilians in military affairs.

III. The Harmless Error Standard Does Not Impermissibly Involve Judges and Civilians in Military Matters.

It has long been established that courts do not involve themselves in promotion decisions. This follows from a long-standing command of the Supreme Court in Orloff v. Willoughby, 345 U.S. 83, 93 (1953):

> judges are not given the task of running the Army . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

On the other hand, judges are given the task of adjudicating claims for loss of pay under 37 U.S.C. § 204 and 28 U.S.C. § 1491 when an officer alleges that he was illegally separated. Sanders, 594 F.2d at 812.

The harmless error construct which is of concern to the Porter Court is imposed for the benefit of the government to prevent its having to pay money as a result of illegal conduct that causes little or no harm. Because the burden of showing harmlessness is placed on the military when the government commits material errors or injustices, it is largely within the military's control to decide the extent to which it wishes to invite civilian and judicial involvement in military matters.

By design, the "harmless error" test is designed to avoid interference with military prerogatives. Sanders, 594 F.2d at 816 (improper to focus our attention on plaintiff's promotion rather than on the propriety of plaintiff's separation"); Skinner v. United States, 594 F.2d 824, 831 (Ct. Cl. 1979) ("promotion reconsideration to determine whether errors

were harmless is inappropriate and nondispositive in an illegal discharge case"); Evensen v. United States, 654 F.2d 68, 74 (Ct. Cl. 1981) (where OER removed, no requirement that promotion be certain before a passover can be voided). The question is never whether an officer would have been promoted. Rather, it is whether the officer would have been competitive. Grieg v. United States, 640 F.2d 1261, 1265-66 (Ct. Cl. 1981) (officer in Riley v. United States, 608 F.2d 441 (Ct. Cl. 1979) entitled to reinstatement because "with th[e] illegal OERs out of his file, [he] was in the competitive zone for promotion."). The military's harmless error rule, in fact, is very similar to standards that are applied by courts in many other circumstances. See Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 286 (1977) (a "borderline or marginal candidate should not have the employment question resolved against him"); Kotteakos v. United States, 328 U.S. 750, 765 (1946) (if error is such that it would have "substantial influence" or if there is grave doubt about effect of error, verdict must be set aside); Cornelius v. Nutt, 472 U.S. 648, 659 n.9 (1985) (harmless error standard in civil service cases analogous to Kotteakos.)

The ultimate issue in deciding the standard of proof is where the risk of error should be placed. The approach adopted by Porter requires veterans to cede their claims because the government's errors and injustice have created an area of uncertainty which the government would rather not resolve. This is not fair. To the extent that these uncertainties cannot be resolved, the risks and burdens should be borne by the wrongdoer.

Porter would not have been difficult to resolve had the government complied with the lower court's orders. The government could have easily produced statistical evaluation data showing whether the key features of his record put him in the bottom 5% of his promotion class. The Air Force's

failure to adduce evidence in its possession should not be a basis for reversing Petitioner's judgment. Laningham v. United States, 5 Cl. Ct. 146, 151 (1984) (it is appropriate to entertain a presumption against the government when it fails to produce available relevant evidence within its control.)

IV. The AFBCMR had no Discretion to Use an "Egregious Error" Standard Under Section 1552, Given the Super-Competitiveness of Selection Board Scoring Procedures; Furthermore, Before Upholding Discretion of AFBCMR to Use an "Egregious Error" Standard Court Should Have Resolved Authenticity and Legality of the Second Addendum.

The Court of Appeals apparently believed that because the Petitioner did not appeal his SSB nonselections under 10 U.S.C. § 628, the issue of supercompetitiveness was not in the case. This was incorrect. The issue was briefed by the Petitioner and by the *Amicus Curiae* because it bore upon the Section 1552 issues that the government appealed. The AFBCMR abused its discretion under Section 1552 when it adopted an "egregious error" standard in the face of the Air Force's supercompetitive SSB standard. This exercise of its discretion, among other things, violated the BCMR's duty to provide full relief. See Ray v. United States, 453 F.2d 754 (1972), Sanders, 594 F.2d at 813.[12]

Two aspects of the SSB's procedures were found by the Trial Court to produce a supercompetitive standard. First, the government admitted in open court that the Air

[12] The constitutional basis as well as the legislative history for affording full relief are discussed in Russell O. Wheeler, *The Secretary of the Air Force, Correction of Military Records and the Limits of Discretion*, 7 Fed. Cir. Bar J. 193, 204-215 (1998).

Force's promotion boards were divided into panels, that the panels had variable quality and that the Air Force's ability to choose the best records from among the panels resulted in SSB benchmark records that were better than the records of officers promoted by the Board. App 170; App. 53. The Trial Court concluded that this process of selecting benchmark records was lawful under 10 U.S.C. § 628 because subsection (b)(2) requires only that the officer's record be compared with "a sampling" of records from the original board. While approving of supercompetitive SSB benchmarks for purposes of Section 628, the Trial Court found them to be an inappropriate tool for making "harmless error" determinations under Section 1552. App. 92 n4.

The second point made by the Trial Court was that AFR 36-89 ¶ 35(d) creates a supercompetitive scoring standard. This regulation provides that an applicant will be selected " if his or her record scores higher than all the nonselect records and ties at least one of the selected records from the original board." This rule increases the difficulty of selection by an SSB, especially if there is an inversion of select and non-select benchmarks.

For example, if the original panel selected candidates 1 through 5 and non-selected candidates 6 through 10 and the SSB panel agreed with the select and non-select outcomes of the original panel, the applicant would need only to tie the fifth best record in order to be recommended for promotion by the SSB. If, on the other hand, the cumulative scores of the SSB differed from those of the original panel and ranked, say, candidate 6 above candidate 5, the applicant would be required to be ranked above candidate 6 in order to be selected (i.e., the applicant would have to be at least tied with the fourth-ranked benchmark in order to be recommended for promotion by the SSB as opposed to tying with the fifth-ranked benchmark in the example above). In

the same vein, if candidate 6 from the original board panel received an odd high score from one of the SSB members and was ranked first on the SSB's order of merit, the applicant would be non-selected--even if he tied with the top-scoring record and was ranked higher than all of the benchmark selects. This would be the case even if the majority of the members of the SSB individually believed that the applicant was the best qualified of the entire field because AFR 36-89 is a mathematical formula that is not altered by any board member vote.

The government responded to these matters in the Second Addendum, a purported record of administrative proceedings that was created after the government lost to Petitioner. App. 115 (see also lodging with the Clerk). Petitioner challenged this Second Addendum in the Court of Appeals on the ground that it had at least a dozen irregularities indicating that it was not actually a product of the AFBCMR. App. 148-187 In October 1998, Congress passed two laws aimed at the misconduct alleged in Petitioner's remand motion. 10 U.S.C. §§ 1555, 1556.

The Court of Appeals never addressed the propriety of relying on the *facts* of the Second Addendum and instead gave assurances that it did not "defer" to the legal positions stated therein. App. 47. It did rely, however, when it stated:

> As the Air Board's [AFBCMR's] Second Addendum demonstrated, the Air Board was capable of deciding Porter's procedural challenge without having to decide whether Porter was or was not better qualified for promotion than the officers selected and not selected by the CY84B and CY85A captain promotion boards. Instead, as the Air Board noted, Porter's allegation of the

> SSB's use of impermissible competitive standards failed for lack of factual support, because of other factual information in the record that undercut Porter's claim that an impermissible supercompetitive standard had been applied to him.
>
> The foregoing responds to Porter's argument that the Air Board abdicates its statutory duties under section 1552 by recommending invocation of an SSB without coupling the SSB recommendation with a voidance of previous passover decisions.

App. 45.

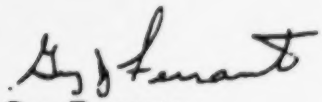
With the exception of the SSB benchmark records which are under seal, the administrative record of the 1995 AFBCMR proceeding is included in *toto* at App. 115-147. From this it is clear that there is zero evidentiary support for the Second Addendum's findings regarding super-competitiveness. In short, the Second Addendum *itself* is the only evidence in the administrative record supporting the Air Force position on that subject. As such, the Second Addendum hardly provided Petitioner with the process he was entitled to receive under Section 1552.

In the event that the outcome of this case turns on the AFBCMR's discretion to use an "egregious error" standard or on the existence of supercompetitive procedures, Petitioner submits that the government must not be permitted to defend its position based on a fraudulent record. Either the Second Addendum must be removed from the case or its authenticity and legality must be established.

Conclusion

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,



Guy Ferrante
King & Everhard, PC
450 W. Broad Street, Ste. 112
Falls Church, VA 22046
(703) 241-8282

Counsel for Petitioner

April 20, 1999

Supreme Court, U.S.
FILED

981689 APR 20 1999

OFFICE OF THE CLERK

No. 99-

In The Supreme Court of the United States

OCTOBER TERM, 1999

GREGORY C. PORTER, *Petitioner,*

v.

UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GUY J. FERRANTE
(Counsel of Record)
KING & EVERHARD, P.C.
Suite 112
450 W. Broad Street
Falls Church, Virginia 22046
(703) 241-8282

Counsel for Petitioner

Of Counsel:

KATHLEEN J. ST. JOHN
KANE ST. JOHN
2900 Delk Road
Suite 700-306
Marietta, Georgia 30067
(770) 850-1175

18788

Order of the Court of Appeals (November 9, 1998) 1
Order denying rehearing (January 20, 1999) 48
Order of the Court of Federal Claims
(December 30, 1992) 50
Order of the Court of Federal Claims
(October 31, 1994) 84
Order of the Court of Federal Claims
(December 30, 1994) 95
Order of the Court of Federal Claims
(May 11, 1995) 100
Record of Proceedings of the AFBCMR
(July 1, 1993) 109
Second Addendum to Record of Proceedings
of the AFBCMR (January 11, 1995) 115
Letter from Maj. Carla S. Walgenbach to
Mr. Mac Burton (December 1, 1994) 135
Memorandum from Lt. Col. Sharon A. Branch
for AFBCMR (December 19, 1994) 139
Memorandum of Instructions: Special
Selection Boards Promotion And
Selective Continuation (November 15, 1993) . . 141
Letter from Raymond H. Weller to
Gregory Porter (December 12, 1994) 147
Petitioner's Conditional Motion for Remand
Filed in the Court of Appeals
(November 17, 1997) 148
Declaration of Larry W. Neptune
(June 7, 1997) 157
Supplemental Declaration of Larry W. Neptune
(August 18, 1997) 160
Talking Paper on Selecting Benchmark
Records (January 7, 1984) 168
Partial Transcript of Hearing in the Court of
Federal Claims 170

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5007

GREGORY C. PORTER,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

COUNSEL: Kathleen J. St. John, of Marietta, Georgia, argued for plaintiff-appellee. Of counsel on the brief were Kane St. John; and Russell O. Wheeler, of Oklahoma City, Oklahoma.

Armando O. Bonilla, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and James M. Kinsella, Assistant Director. Of counsel on the brief were Lt. Col. Steven J. Pecinovsky and Major Joginder Dhillon, General Litigation Division, United States Air Force, of Arlington, Virginia. Also of counsel was Gregory C. Porter, pro se plaintiff-appellant.

Kathleen J. St. John, of Marietta, Georgia amicus curiae for Guy Ferrante.

Appealed from: United States Court of Federal Claims
Judge Diane Gilbert Weinstein

DECIDED: November 9, 1998

Before MICHEL, CLEVENGER, and BRYSON, Circuit Judges.

CLEVENGER, Circuit Judge

This appeal presents questions of first impression relating to the authority and duty of civilian boards for the correction of military records. The case involves the Air Force Board for the Correction of Military Records ("Air Board" or "AFBCMR"). The plaintiff and appellee, Gregory C. Porter, was twice passed over, in 1984 and 1985, for promotion to captain in the Air Force, and was honorably but involuntarily discharged in May 1985 under the statutory "up or out" rule. Thinking his initial passover to be the result of a faulty Officer Effectiveness Report ("OER"), Porter applied to the Air Board for correction of his record to exclude the challenged OER from his record, and to be considered again for promotion by another officer selection board. Before the Air Board acted on his application, Porter was passed over for promotion a second time in 1985. The Air Board agreed with Porter that his record contained a faulty OER, and recommended to the Secretary of the Air Force that he be considered for promotion again by Special Selection Boards ("SSBs") convened under the authority set forth in 10 U.S.C. § 628 (1994), on his corrected record. The Air Board, however, did not recommend that Porter's previous passovers be voided. Such a recommendation would have removed the legal basis for Porter's 1985 discharge, resulting in constructive if not actual reinstatement to his pre-discharge rank of first lieutenant and entitlement to back pay and related benefits. The Air Board's unwillingness to make such

a recommendation frames the issue for decision in this appeal.

I

Porter argues that the Air Board lacks the authority to refer his record to an SSB under 10 U.S.C. § 628 unless it also recommends that his previous passovers be voided, thus vacating his discharge and entitling him to back pay and related benefits. He bases his argument on his reading of section 628 and on holdings of our predecessor court, the United States Court of Claims, in cases governing the actions of civilian boards for the correction of military records taken at a time before SSBs were created and available to participate in the process of correction of military records. Porter argues that under those holdings the Air Board's recommendation that his record be presented to selection boards constitutes an implicit voidance of his two initial passovers and discharge.

The government argues to the contrary that the Air Board is not required by statute or case law to void initial passovers before recommending consideration by an SSB in every instance, and that no error lies in the Air Board's refusal to void Porter's passovers before recommending his assessment by SSBs. The government takes a more flexible view of the Air Board's powers, under its statutory charter, 10 U.S.C. § 1552 (1994), and under section 628. The government argues that, depending on the circumstances of a given case, the Air Board may correct such records as it deems necessary when recommending that an SSB be convened to replicate the work of the original selection boards that twice passed over a discharged officer. In some instances, such correction may involve voiding the initial passovers, and in other instances the recommended corrections may entail only correction of the record that was laid before the original selection boards. The government

argues that the pre-section 628 case law of our predecessor court is inapplicable to the Air Board's authority to recommend referral of a discharged officer's record to an SSB.

After extended litigation before the Air Board and the United States Court of Federal Claims, the Court of Federal Claims agreed with Porter's arguments. It held that the Air Board acted arbitrarily when it referred Porter's case to SSBs without also voiding his initial passovers, with the stated consequences of entitlement to back pay and related benefits. See Porter v. United States, No. 91-1008C (Fed. Cl. May 24 & Aug. 6, 1996). The government brings this appeal, over which we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (1994). Because only questions of law are before us, we exercise our review authority independent of the views of the Court of Federal Claims. See Columbia Gas Sys., Inc. v. United States, 70 F.3d 1244, 1246 (Fed. Cir. 1995).

As is evident from the foregoing and will become more so from the following, the technical aspects of this case and of the underpinnings of our predecessor court's holdings are complex. The core questions for decision, however, are simple: must the Air Board in every instance couple a recommendation to convene an SSB with voidance of previous passovers, and, if not, was the Air Board's recommendation in Porter's case to convene an SSB without voiding his two previous passovers arbitrary, capricious, unsupported by substantial evidence or contrary to law?

Essentially in agreement with the government's arguments in this appeal, we hold that the Court of Federal Claims erred in its assessment of the legal authority of the Air Board. Because the Air Board was authorized to correct Porter's record and recommend use of SSBs to consider Porter's promotion prospects in light of the corrections without also

recommending voidance of Porter's previous discharge-mandating passovers, Porter is not entitled to back pay and related benefits. His discharge in 1985 was lawful.

II

Porter entered active duty with the Air Force in 1981 and was honorably, but involuntarily, discharged in 1985 under the military's "up or out" requirements after he was passed over twice for promotion from reserve first lieutenant to captain. See 10 U.S.C. § § 627, 631 (1994); Air Force Reg. 36-12 (Oct. 1, 1984). Porter's first passover occurred before the Calendar Year 1984 B ("CY84B") captain promotion board. His second passover resulted from deliberations by the Calendar Year 1985 A ("CY85A") captain promotion board. Porter contested both passovers to the Air Board. The Air Board determined that a January 1984 OER had unfairly underrated Porter's promotion potential. The Air Board thus recommended to the Secretary of the Air Force that the OER be voided and that two SSBs (for each of the CY84B and CY85A captain promotion boards) convene to reconsider Porter for promotion. The Assistant Secretary of the Air Force, on behalf of the Secretary, accepted the Air Board's recommendation. The SSBs convened in March 1986 and determined that Porter would not have been promoted by either original promotion board even with the corrected records.

In 1988, Porter again applied to the Air Board for the correction of his records, alleging that the removal of the erroneous January 1984 OER had created a prejudicial gap in his record, that his duty titles had been incorrectly listed on some of his reports, and that a 1984 Letter of Evaluation ("LOE") attached to a November 1984 OER and written by the same reviewer as the January 1984 OER, repeated the substance of the January 1984 OER and perpetuated its negative effect. He also questioned whether his records had

been properly compared to those of other officers during the review process. For relief, Porter sought "reinstatement" at the rank of captain, with back pay and allowances at that rank. The Air Board denied his application and his subsequent request for reconsideration after concluding that the SSBs had not acted improperly.

Porter began what became an extensive litigation before the Court of Federal Claims when he filed a pro se complaint in 1991 that repeated the substance of his allegations before the Air Board and sought back pay and various damages. On the government's motion for summary judgment, the court determined that the gap in Porter's record created by the missing 1984 OER was adequately cured by a letter explaining the gap to the SSBs. See Porter v. United States, No. 91-1008C, slip op. at 12 (Fed. Cl. Dec. 30, 1992). However, the court also determined that the 1984 LOE contained errors that were equal in significance and materiality to the errors of the voided OER, that Porter's job history was incorrectly reflected in his records and operated to his disadvantage, and that the government did not rebut several of Porter's allegations regarding procedural errors before the SSBs. Id. at 14-26. Deferring to the Air Board, the court declined to order back pay, and instead remanded the case. Id. at 27. The court directed the Air Board to reconsider Porter's case and determine whether the 1984 LOE and the misstated duty titles constituted a significant error or injustice, and, if so, whether the errors were harmless because Porter would not have been promoted even with the errors corrected. Id. at 27-28, 30. In particular, the court stated that:

> If, on remand, the AFBCMR determines that there were one or more significant errors in the records before the SSB, it shall make whatever recommendations to the Secretary it deems appropriate, including reinstatement, back pay,

> correction of records (including, but not limited to, voiding the SSB decisions), and another opportunity to be considered by an SSB sitting for the CY 84B and CY 85A selection boards.

Id. at 31.

On remand, the Air Board concluded that the misstated duty titles should be corrected and the LOE should be removed from Porter's record. Because the "recommended corrections will materially change the applicant's record," the Air Board recommended that Porter be again considered by two SSBs in place of the original CY84B and CY85A captain promotion boards. However, the Air Board concluded that insufficient evidence had been presented to "demonstrate the existence of probable error or injustice in regard to applicant's request for promotion," and that

> [i]t cannot be conclusively determined whether or not applicant would have been selected for promotion by the selection boards in question. We believe a duly constituted SSB applying the appropriate promotion criteria is in the most advantageous position to render this determination. We believe applicant's record, to include the above recommended corrections, can receive a fair and equitable consideration for promotion by the SSB process. Therefore, we do not recommend favorable action on his request for promotion.

In essence, the Air Board, composed entirely of civilians, did not consider itself bound to decide the relative merits of Porter's promotion prospects. Instead, it viewed an SSB--composed entirely of military officers--as better qualified to compare Porter's corrected record to the benchmark records that define the promotion threshold of the original selection board. In response to the Air Board's recommendation, the

Secretary's designee then ordered that Porter's record, as corrected, be considered again by the two SSBs, acting in lieu of the CY84B and CY85A captain promotion boards. Those SSBs met in November 1993 and both recommended that Porter not be promoted.

The case returned to the Court of Federal Claims on cross-motions for summary judgment. The government asserted that the decisions of the 1993 SSBs show a lack of nexus between the errors that had been corrected in Porter's records and the previous passover decisions: because the 1993 SSBs passed over Porter even on the corrected records, the government asserted that the errors before the earlier selection boards must be harmless. In addition, the government asserted that the 1993 SSBs suffered no defects. Porter's cross-motion alleged that a nexus indeed existed between the errors before the 1986 SSBs and their decisions, and that the 1993 SSBs committed three procedural errors. See Porter v. United States, No. 91-1008C, slip op. at 3 (Fed. Cl. Oct. 31, 1994), as clarified, No. 91-1008C (Fed. Cl. Dec. 30, 1994).

On the cross-motions, the court ruled that there was no evidence that the 1993 SSBs had acted improperly with regard to two of Porter's alleged procedural errors. Id. at 4-5. As to whether the 1993 SSB proceedings contained inadequate benchmark records that were improperly rescored, as Porter alleged, the court remanded the case once again to the Air Board. The Air Board was ordered to review the full record before the 1993 SSBs to ensure that Porter's nonselections were not arbitrary, capricious, unsupported by substantial evidence, or legally erroneous. Id. at 9. In addition, the court determined that the Air Board had impermissibly given the 1993 SSBs the power to determine whether the flawed data before the 1986 SSBs amounted to harmless error, rather than making that determination itself before recommending that the 1993 SSBs decide anew

whether Porter should have been promoted. See id. at 7-8. The court determined that the Air Board, by referring Porter's case to the SSBs, necessarily voided the original selection boards' passovers and thereby constructively reinstated Porter, thus entitling him to back pay. See id. The court therefore ordered that Porter's records be corrected to show reinstatement as of the day of his discharge in 1985 and entitlement to back pay until he is deemed passed over twice by lawful process and lawfully discharged. Id. at 9. In reaching its conclusion, the court took its direction from a series of Court of Claims cases involving actions by civilian corrections boards that predated the enactment of 10 U.S.C. § 628. The cases relied on by the court in the December 1992 and October 1994 decisions, as chronologically decided, are Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804 (Ct. Cl. 1979); Doyle v. United States, 220 Ct. Cl. 285, 599 F.2d 984 (Ct. Cl. 1979); Hary v. United States, 223 Ct. Cl. 10, 618 F.2d 704 (Ct. Cl. 1980); Evensen v. United States, 228 Ct. Cl. 207, 654 F.2d 68 (Ct. Cl. 1981); and Engels v. United States, 230 Ct. Cl. 465, 678 F.2d 173 (Ct. Cl. 1982).

The government moved promptly for clarification of the court's October 31, 1994, order, asserting that it would be improper to order Porter's reinstatement in light of the two passover decisions by the 1993 SSBs that were still in effect, although these decisions remained subject to review by the Air Board for potential procedural flaws pursuant to the court's remand order. In response, the court revised its order, as follows:

> The AFBCMR having failed to do so explicitly, either in 1993 when it vacated the 1986 SSBs' passovers, or in 1985 when it vacated the CY 84B and CY 85A selection boards' passovers, the court assumes that Mr. Porter's records have been corrected constructively to show reinstatement in active duty at the rank of first lieutenant as of August 31, 1985, up

> until at least six months after his second passover by the 1993 SSB, see 10 U.S.C. § 631(a)91), (and longer if the 1993 SSBs' decisions are voided by the Secretary at the recommendation of the AFBCMR, or by this court). The court also assumes that, as the result of such constructive duty, Mr. Porter is entitled to back pay for that period, calculated in accordance with law. If the AFBCMR declines to recognize plaintiff's entitlement to such correction or benefits, the court will exercise its own authority to do so.

Porter v. United States, No. 91-1008C, slip op. at 4 (Fed. Cl. Oct. 31, 1994), as clarified, No. 91-1008C (Fed. Cl. Dec. 30, 1994). The court thus introduced a legal fiction to the record that Porter's initial two passovers had been voided, when in fact the record clearly reflects the Air Board's refusal to recommend that correction to Porter's record.

On the second remand, the Air Board found that the 1993 SSBs had acted correctly and had not reversibly erred in determining that Porter would not have been promoted by the earlier review boards. The Air Board's conclusions are set forth in a document denominated as "Second Addendum to Record of Proceedings" that details the proceedings at a meeting of the Air Board held on January 11, 1995, when Porter's request for correction of his records was denied.

In particular, the Air Board rejected the court's assumption in its amended order of December 30, 1994, that the Air Board had previously corrected Porter's records to vacate the earlier passovers and had thus constructively reinstated Porter to active duty with the right to pay. The Air Board explained its position in detail and at length. The heart of the Air Board view is its assertion that the cases relied upon by the court to support its assumed correction of Porter's record have no bearing on a recommendation by the Air Board that an SSB

be convened to assess whether an officer should be promoted.

The Air Board explained its view that the statute creating SSBs, 10 U.S.C. § 628 (1994), altered the analytic process by which the Air Board had previously determined whether an officer's records should be corrected to show a recommendation of some promotion. According to the Air Board, nothing in the law prevented it from recommending correction of Porter's record and submission of the corrected record to an SSB without also recommending voidance of his previous passovers, constructive reinstatement and entitlement to back pay. In short, the Air Board asserted the right to recommend further assessment of Porter's qualification for promotion by an SSB without the Air Board itself first making a determination that the errors requiring correction were in fact not harmless to the nonselection decision of a previous selection board. At bottom, the Air Board asserted in the Second Addendum that it was not obligated to conduct the harmless error analysis prescribed by the Court of Federal Claim in its December 30, 1992, order. Although the harmless error test was designed to determine the relative merits for promotion of one officer (here, Porter) over other officers (both those selected and nonselected by the original selection boards), the Air Board had previously determined, in response to the December 30 order, that, in this particular case, it was unable to decide those relative merits on the basis of his corrected record. To the mind of the civilian corrections board, that decision would better be made by military personnel applying the appropriate selection criteria.

To the extent that the government lawyers appearing before the Court of Federal Claims had previously pitched their case in terms of whether the Air Board had in fact found the errors in Porter's record to be harmless, the Second Addendum made clear that the Air Board did not feel

constrained in this case to apply the harmless error test. The legal theory on which the Air Board was proceeding was that the harmless error test, derived from pre-section 628 case law, is inapplicable to Porter's case. The Air Board also responded to the remand order from the Court of Federal Claims directing the Air Board to decide the merits of Porter's contention of material procedural error concerning benchmarks used by the 1993 SSBs in scoring the pertinent officer records. As Porter understood the contents of the benchmarks used by the 1993 SSBs, his record was better than one of the records of an officer who had been selected by the CY85A captain promotion board. Thus, according to Porter, the 1993 SSB in essence imposed a "supercompetitive" standard, requiring him to outperform a selected officer, as opposed to simply matching the score of a selected officer.

The Air Board initially resisted this remand order on the ground that it might compel it to make a comparative decision as to which candidates were better qualified for promotion, a matter that the Air Board thought was better suited to an SSB decision. The Air Board nevertheless assessed Porter's contention. Even though Porter's record scored better than one of the officers selected by the CY85A captain promotion board, the other attributes of the selected captain's record demonstrated that Porter's record was overall less competitive. The Air Board found that there was "a clear distinction between the quality of the applicant's records and the quality of the benchmark records of the selectees and nonselectees from the original selection boards." The Air Board thus concluded that the procedural error cited by Porter did not undermine the 1993 SSB decision that Porter would have been passed over by the CY85A captain promotion board had his corrected record been before it in the first instance.

The case again returned to the Court of Federal Claims. After briefing and oral argument, the court agreed that the decisions of the 1993 SSBs contained no reversible error. See Porter v. United States, No. 91-1008C, slip op. at 7 (Fed Cl. May 24, 1996). With regard to Porter's contention of procedural error due to improper benchmarks and scoring, the court concluded that "plaintiff's record is not clearly equal or superior to any of the benchmark records of officers selection [sic, selected] for promotion." Id. However, the court rejected the government's view of the Air Board's authority (as set forth in the Second Addendum) to recommend use of SSBs without also voiding previous passovers and the government's argument that pre-section 628 case law is inapplicable to this case. Id. at 6-7. The court again held that the Air Board's referral of Porter's case to the SSBs entitled him to back pay, because "referring an applicant to an SSB necessarily implies that at least one of his or her passovers was invalid, and an officer without two valid passovers cannot be discharged." Id. at 6 (emphasis in original). The court concluded that Porter had constructively served until the 1993 SSBs properly removed him, and that he should receive back pay for the period from his original discharge until his discharge following the nonselection decisions of the 1993 SSBs. Id. at 7.

The government appeals, arguing that the Air Board never reinstated Porter and never was obligated to do so, either actually or constructively, and, as a result, Porter is not entitled to back pay. For his part, Porter supports the analysis of the Court of Federal Claims and does not argue on appeal that the decisions of the 1993 SSBs are infected with error.

This appeal raises questions of statutory interpretation of the law that provides for the creation and empowerment of civilian boards for the correction of military records, 10 U.S.C. § 1552 (1994), and the law that provides for the creation and operation of SSBs, 10 U.S.C. § 628 (1994).

Those questions must be decided in the context of a body of law, developed by the Court of Claims before the enactment of section 628, that established rules for determination of whether an officer's involuntary discharge after two passovers was proper.

III

Section 1552 of title 10 gives the military secretaries power to correct military records using civilian boards. It reads, in relevant part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2) [dealing with enlistment and promotion of enlisted soldiers] such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.

10 U.S.C. § 1552 (1994). Each military department has issued regulations that govern the operation and procedures of its board for the correction of military records. In the instance of the Air Force, the pertinent regulation is 36-2603, Air Force Board for Correction of Military Records, (Mar. 1, 1996) (codified as 32 C.F.R. § 865 (1997)). The Air Force also publishes Air Force Pamphlet 36-2607, entitled "Applicant's Guide to the AFBCMR," to provide information on the corrections process to applicants. 32 C.F.R. § 865.3(b).

Section 1552 does not limit the kind of military record subject to correction. Consequently, a corrections board may

entertain any kind of application for correction, ranging from changing the terms of a discharge, see Faircloth v. United States, 186 Ct. Cl. 133 (1968), to correction of error in citation of awards received, see Swann v. Garrett, 811 F. Supp. 1336 (N.D. Ind. 1992), to amending the records of Porter in this case, which include OERs, passover (or nonselect) decisions by promotion boards and SSBs, and discharge orders. Sheer volume of applications-approximately 5000 applications per year in the instance of the Air Board-suggests the wide range of subject matter embraced in the applications.

In the Air Force, the Air Board acts for the Secretary and its decision is final when it denies applications, except in the case of applications to correct records based on allegations of whistleblowing conduct protected by 10 U.S.C. § 1034 (1994). In whistleblower cases and all other cases involving favorable recommendations on applications, including recommendations that an officer be promoted, the Secretary of the Air Force acts as the final decisional authority. See 32 C.F.R. § 865.4(p). Therefore, in this case, the decisions by the Air Board denying Porter's application to void his various passovers stood as final decisions, whereas the Air Board's decision to grant his application to correct certain OERs was a recommendation upon which the Secretary, through his delegate, was required to and did act.

When the issue at hand is whether an officer has properly been discharged pursuant to the "up or out" rule, the record before the selection boards that passed over the officer, and the legality of action of those boards, both in their composition and procedural operation, become the focus of attention.

The fundamental ground rule is that

> the selection procedure must follow the law. The documents which are sent to a Selection Board for its consideration therefore must be substantially complete, and must fairly portray the officer's record. If a Service Secretary places before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes.

Weiss v. United States, 187 Ct. Cl. 1, 408 F.2d 416, 419 (Ct. Cl. 1969). Consequently, the law requires that another selection board be presented with a substantially complete and fair record. See Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804, 814 (Ct. Cl. 1979). When called upon to review a decision of a corrections board, or of a Secretary taken upon recommendation from a corrections board, the standard of review is whether the decision is arbitrary, capricious, unsupported by substantial evidence or contrary to law. See Skinner v. United States, 219 Ct. Cl. 322, 594 F.2d 824 (Ct. Cl. 1979).

Thus, another way to state the issue before us is whether the decision of the Secretary, upon recommendation of the Air Board, to void Porter's January 1984 OER without voiding Porter's passovers can withstand the standard of review.

IV

The second statutory provision central to this case, section 628 of title 10, is entitled "Special Selection Boards" and permits the Secretaries to convene SSBs. The statute was enacted as part of the Defense Officer Personnel Management Act in 1980 ("DOPMA"). It reads, in full:

(a)(1) In the case of an officer who is eligible for promotion who the Secretary of the military department concerned determines was not considered for selection for promotion by a selection board because of administrative error, the Secretary concerned, under regulations prescribed by the Secretary of Defense, shall convene a special selection board under this subsection (composed in accordance with section 612 of this title or, in the case of a warrant officer, composed in accordance with section 573 of this title and regulations prescribed by the Secretary of the military department concerned) to determine whether such officer should be recommended for promotion.

(2) A special selection board convened under paragraph (1) shall consider the record of the officer as his record would have appeared to the board that should have considered him. That record shall be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that should have considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion an officer in a grade below the grade of colonel or, in the case of an officer of the Navy, captain whose name was referred to it for consideration, the officer shall be considered to have failed of selection for promotion.

(b)(1) In the case of an officer who is eligible for promotion who was considered for selection for promotion by a selection board but was not selected, the Secretary of the military department concerned,

under regulations prescribed by the Secretary of Defense, may convene a special selection board under this subsection . . . to determine whether such officer should be recommended for promotion if the Secretary concerned determines that--

the action of the board which considered the officer was contrary to law or involved material error of fact or material administrative error; or the board did not have before it for its consideration material information.

(2) A special selection board convened under paragraph (1) shall consider the record of the officer as his record, if corrected, would have appeared to the board that considered him. That record shall be compared with the records of a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him.

(3) If a special selection board convened under paragraph (1) does not recommend for promotion an officer whose name was referred to it for consideration, the officer incurs no additional failure of selection for promotion.

(c)(1) Each special selection board convened under this section shall submit to the Secretary of the military department concerned a written report, signed by each member of the board, containing the name of each officer it recommends for promotion and certifying that the board has carefully considered the record of each officer whose name was referred to it.

The provisions of sections 617(b) and 618 of this title apply to the report and proceedings of a special selection board convened under this section in the same manner as they apply to the report and proceedings of a selection board convened under section 611(a) of this title.

(d)(1) If the report of a special selection board convened under this section, as approved by the President, recommends for promotion to the next higher grade an officer whose name was referred to it for consideration, such officer shall, as soon as practicable, be appointed to the next higher grade in accordance with subsections (b), (c), and (d) of section 624 of this title.

(2) An officer who is promoted to the next higher grade as the result of the recommendation of a special selection board convened under this section shall, upon such promotion, have the same date of rank, the same effective date for the pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him.

(e) The provisions of section 613 of this title apply to members of special selection boards convened under this section.

10 U.S.C. § 628 (1994). We quote the entirety of section 628 to demonstrate the significance of SSBs to the full panorama of cases that entail material flaws in the military promotion process.

A

Before DOPMA, the military departments lacked access to any statutory special selection boards to make promotion or passover decisions when original selection boards had passed over an officer in circumstances in which the officer's record before the original boards contained faulty OERs. At that time, Standby Advisory Boards "(STABs") existed by virtue of military department regulation. From time to time, a civilian correction board, or the department itself, would send an officer's record to a STAB for consideration after initial passovers. Sometimes, the STAB was convened to replicate, or act in lieu of, the original selection board. See Evensen v. United States, 228 Ct. Cl. 207, 654 F.2d 68 (Ct. Cl. 1981). Other times, the STAB was convened to render an advisory opinion to the civilian correction board on the officer's likelihood of promotion based on his corrected record. See Braddock v. United States, 9 Cl. Ct. 463 (1986). STABs, however, could only make recommendations on promotion matters. They, unlike SSBs, did not make the final military decision whether [or] not to promote an officer.

DOPMA was the first major revision of military officer personnel law since the Officer Personnel Act of 1974. See D. Bent, "DOPMA: An Initial Review," Army Lawyer, April 1981, p. 3. The most significant feature of this 121-page act, Pub. L. No. 96-513, 94 Stat. 2835, was its rejection of the dual promotion system under which the regular and reserve components of each military service had separate statutory promotion systems, and the elimination of separate provisions for permanent and temporary promotions. Other important provisions changed the timing pursuant to which officers would be considered for promotion and altered conditions that require discharge of officers who are not selected for promotion. Shortly after enactment, the legislation was described in the publication Army Lawyer as

"a highly complex, multi-faceted piece of legislation [that] will impact upon the officer corps in a wide variety of ways . . ." Bent, supra, at 16.

The legislative history of DOPMA is extensive and detailed concerning the major features of the Act. With regard to section 628, however, there is but a single brief reference in the legislative history. Furthermore, since its enactment in 1980, section 628 has not been interpreted or applied to a twice passed-over officer by this court or its predecessor. In addition, although the conduct of the Air Board is restricted by regulation, the pertinent Air Board regulations do not regulate, control or dictate the circumstances under which an Air Board can recommend referral of an officer's record to an SSB. See 32 C.F.R. §§ 865 et seq. This, then, is an instance of genuinely independent judicial review of this important part of the military personnel management system.

When we put the facts of this case into the construct of section 628(b),[1] we note the odd posture of this case. By the time of his consideration (and subsequent passover) by the 1993 SSBs, Porter's record had been corrected to remove the offensive OER and other prejudicial information. Indeed, Porter no longer argues that he is entitled to be promoted because of procedural error by the SSBs. Porter thus concedes that he is now lawfully discharged. Nonetheless, Porter asserts that the failure of the Air Board at some past time to void his two passovers amounts to an error of law

---

[1] Not all of section 628 is before us in this case. Because of the facts presented here, we may overlook section 628(a)(1), (2), and (3), dealing with cases in which an officer did not meet a regular selection board at all because of administrative error. This case also does not require us to interpret and apply section 628(c)(1)-(2) and (d)(1)-(2), except to note that the latter provisions make the decision of an SSB to promote an officer binding on the military department in question. Thus, it is the language of section 628(b) and its interaction with the other statutory provisions at issue in this case that we review here.

entitling him to constructive reinstatement as of 1985, back pay and related benefits.

B

Shortly after promulgation of section 628, the Air Force issued a regulation relating to SSBs. See AFR 36-89 (Sept. 15, 1981). The regulation contemplated that SSBs would be convened for officers on active duty (presumably those officers passed over just once by a selection board and desiring to challenge the proceedings of that selection board), and also for "separated officers (who have not been restored to active duty) who have petitioned the Air Board or a court to be restored to active duty." Sec. 5-3, AFR 36-89 (Sept. 15, 1981). In "Consequence of Nonselection," Sec. 5-7, the regulation stated that an officer meeting an SSB, but not recommended for promotion by the SSB, would "incur no additional failure of selection for promotion unless the results of the original board(s) were set aside (voided) by proper authority when the case was referred to the special selection board." See also, AFR 36-89 (April 17, 1992) and AFI 36-2501 (Mar. 1, 1996). In those cases, the passover by the SSB amounted to an additional failure of selection, in that it replaced the previous nonselection decision that had been voided before the officer's record was sent to the SSB.

These two provisions together reveal the Air Force's contemporaneous understanding of those officers for whom SSBs could be convened. They also evidence the understanding of the Air Force that in some but not all instances passover decisions by regular selection boards may be voided before an officer meets an SSB. The same interpretation continued after 1981, when the Air Force amended the SSB regulation to provide, inter alia, a different test that the officer must meet to succeed before an SSB. The amended test requires that in order to be selected for promotion by an SSB, the SSB must find that the applicant's

record scores higher than all the nonselect records and ties at least one of the selected records from the original selection board. See Sec. 35d., AFR 36-89 (April 17, 1992) and Air Force Information (AFI) 36-2501 (March 1, 1996).

The decision to convene an SSB in any particular case was made if the Secretary of the Air Force, or one properly acting on behalf of the Secretary, such as the Air Board, determined that

> (1) The action of the board that considered the officer was contrary to law or involved material error of fact or material administrative error, or
>
> (2) The board did not have before it for its consideration, material information that should have been available had pertinent Air Force regulations and policies been complied with.

See Sec. 5-4b., AFR 36-89 (Sept. 15, 1981); Sec. 33a.(2), AFR 36-89 (April 17, 1992); Secs. 6.3.2.1 & 6.3.2.2, AFI 36.2501 (Mar. 1, 1996). The Air Force regulations for SSBs have thus consistently stated that access to an SSB occurs when the Secretary, or his or her designee, determines that a "material error of fact" was "involved" in the previous passover decisions. Neither the statute nor the regulations define the term "material error of fact."

Aside from the language of the regulations noted above, we have not found, nor have the parties suggested to us, any other support for or against the proposition that a decision of the Air Board to convene an SSB must, as a matter of law, be coupled with a recommendation that previous passovers be voided. As noted, the contemporaneous regulations suggest that such coupling may occur in some cases, but not in others. To the extent that the regulations can be said to aid in our inquiry, they seem to indicate that the Air Force and the

Air Board are vested with a measure of flexibility in deciding whether to void passovers in a given case before convening an SSB.

C

The one small reference to section 628(b) in the legislative history is instructive in the context of the facts here: "The purpose of this subsection is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error." H.R. Rep. No. 96-1462, at 74 (1980). The retroactive nature of an SSB's inquiry, as suggested by this legislative history, is confirmed by the text of section 628(b)(2), which specifies that an SSB considers "the record of the officer as his record, if corrected, would have appeared to the board that considered him [and passed him over]." Further, the same statutory provision requires the SSB to compare the officer's record with a sampling of records of officers selected and not selected for promotion by the previous selection board. 10 U.S.C. § 628(b)(2). Even more evidence of the nunc pro tunc nature of the SSB deliberation is found in the provision that protects an officer passed over by an SSB from any additional failure of selection for promotion (unless, of course, as the regulations specify, the officer's initial passover is voided before his record is considered by an SSB). 10 U.S.C. § 628(b)(3). Finally, subsection (d)(2) provides that the consequences of a selection decision by an SSB relate back to the date of the selection board decision that passed the officer over. This subsection states that the officer who prevails before an SSB shall have the same position on the active duty list with the requisite pay and benefits that accrue to the rank to which the officer is promoted as a result of the SSB decision. 10 U.S.C. § 628(d)(2). As a whole, we think it is clear that Congress intended: (1) an SSB's decision to relate back to the date of

the original selection board's decision; and (2) for the SSB's decision to stand in place of the earlier selection board decision.

V

We turn now chronologically to the pre-DOPMA case law in the Court of Claims on which the Court of Federal Claims and Porter rely for the conclusion that a decision by the Air Board to recommend an SSB necessarily requires voidance of previous passovers, with the attendant consequences of such a correction of an officer's record. We note and emphasize at the outset that none of the cases discussed below contemplated or pertained to the statutory and regulatory framework established after the enactment of section 628 in DOPMA.

In Sanders v. United States, 219 Ct. Cl. 285, 594 F.2d 804 (Ct. Cl. 1979), the Court of Claims, sitting en banc, considered the case of an officer who had been discharged after the requisite passovers by promotion boards. On petition, the Air Board recommended, and the Secretary approved, correction of the officer's records to remove four OER's. The Air Board, however, did not act on the officer's request to void the initial passover decisions made by selection boards that had seen the erroneous OERs. The officer was subsequently twice passed over again, on the basis of a record omitting the erroneous OERs but failing to account for the gap in the record caused by their omission. The officer brought suit in the Court of Claims, asserting that the Air Board had acted arbitrarily and capriciously in failing to void the initial passovers. The officer sought reinstatement and back pay.

The Court of Claims noted that the burden of proof falls on the plaintiff to demonstrate an "abuse of administrative discretion [that] rises to the level of legal error which merits

judicial relief." Id. at 813. According to the court, such cases of abuse are comparatively rare, "because the proof must overcome the strong, but rebuttable, presumption that the administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith." Id. (citing Doggett v. United States, 207 Ct. Cl. 478, 483 (1975); Skaradowski v. United States, 200 Ct. Cl. 488, 471 F.2d 627 (Ct. Cl. 1973); Hertzog v. United States, 167 Ct. Cl. 377 (1964); Prince v. United States, 127 Ct. Cl. 612, 119 F. Supp. 421 (Ct. Cl. 1954)).

Because Sanders had been passed over subsequently on a record that omitted the erroneous OERs, and discharged, the government argued that Sanders could not prevail unless he could show that he would or probably would have been selected "but for" the errors in his record. In other words, under the government's view of the allocation of burdens of proof, Sanders would have to "show that the defects in his file alone led to the non-promotion decisions and to his discharge." Id. at 814.

The Court of Claims grasped the consequences of such a "but for" test for the officer: "the test requires proof of inherently subjective considerations not really susceptible of proof. It would be all but impossible for a serviceman to prove he would have been promoted but for the defendant's error." Id. at 816. Furthermore, the "but for" test would have focused the court's analysis and decision on the merits of Sander's promotion prospects, instead of on the alleged demerits of his discharge. In particular, the court observed that:

> carried to its logical conclusion, the defendant's but for test would, assuming a plaintiff could produce any viable proof under it at all, place on the court the burden of deciding the issue of promotability. We are not a super selection board. We have repeatedly made

> it clear that deciding who gets a promotion is not our responsibility, absent proof of a legal right to it which has been violated.

Id. at 816. The court's firm reluctance to let itself be pushed into the arena of military personnel promotion decisions was rooted in the long-standing command from the Supreme Court that:

> judges are not given the task of running the Army . . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters . . . .

Orloff v. Willoughby, 345 U.S. 83, 93, 94, 97 L. Ed. 842, 73 S. Ct. 534 (1953). Indeed, the Court of Claims itself had stated the impropriety of courts intruding into military promotion decisions:

> The reluctance of the judiciary to review promotion actions of selection boards is rooted not only in the court's incurable lack of knowledge of the total grist which the boards sift, but also in a preference not to meddle with the internal workings of the military . . . . The promotion of an officer in the military service is a highly specialized function involving military requirements of the service and the qualifications of the officer in comparison with his contemporaries, plus expertise and judgment possessed only by the military. No court is in a position to resolve and pass upon the highly complicated questions and problems involved in the promotion procedure, which includes, but is not limited to, an analysis of the fitness reports and

> personnel files and qualifications of all the officers considered . . . .

Brenner v. United States, 202 Ct. Cl. 678, 692, 693-94 (1973), cert. denied, 419 U.S. 831, 42 L. Ed. 2d 56, 95 S. Ct. 54 (1974).

In light of this law--and its own fear of treading on impermissible legal ground--the court in Sanders placed the ultimate burden of proof on the government to show that the officer would not have been promoted had his record contained no error. Sanders, 594 F.2d at 816.

Analyzing the proceedings before the Air Board in Sander's case, the court surmised that the Air Board had in fact applied a but for test to Sander's case, and by doing so had "usurped the functions of the selection board, making itself a sort of super selection board, instead of correcting the error and injustice as its charter contemplates...." Id. at 817. Thus, it was legal error for the Air Board to use the wrong test to measure Sander's application for relief. Nonetheless, the court sympathized with what it took to be the desire of the Air Board to "formulate a standard for harmless error to avoid windfall recoveries." Id. at 818.

Although the Air Board had not applied a harmless error standard to the facts in Sander's case, the court deemed the errors in Sander's record so severe as to require the voiding of the passover decisions based on erroneous records. Harmless error, according to the court, lies when "substantial evidence shows that it was unlikely that the officer would have been promoted in any event." Id. Because the burden to produce such substantial evidence is on the government, and because "that evidence is missing here," Sanders was entitled to prevail.

Two months after deciding Sanders, the Court of Claims again confronted a case en banc concerning officers discharged after two passovers: Doyle v. United States, 220 Ct. Cl. 285, 599 F.2d 984 (Ct. Cl. 1979). In this instance, the officers in question had served in the U.S. Army Reserve. By statute, the boards that considered the officers for promotion were to include an appropriate number of Reserve officers. The selection boards that produced the passovers requiring discharge of the plaintiff officers, however, contained no Reserve officers. The Army Board for Correction of Military Records responded to the fundamental defect in the composition of the selection boards by recommending to the Secretary that the passed over officers be reconsidered by properly constituted selection boards. The initial passover decisions were not voided, and the officers that had been discharged because of two passovers were not reinstated with back pay. Properly constituted boards later passed over the officers again. Doyle, 599 F.2d at 992.

The government sought to excuse the unlawful composition of the original selection boards on the ground that such error was proven harmless by the later passovers by properly constituted boards. The officers argued that the error in the original boards had been so fundamental that their initial passovers should be voided, with the consequence of reinstatement and back pay until the properly constituted boards later passed them over, causing their lawful discharge. The court responded by holding the harmless error test inapplicable to a fundamental "procedural violation [that] penetrates to the heart of the process Congress deemed necessary for fair judgment in selecting officers for promotion . . . ." Id. at 996. Clearly underpinning this holding is the logical proposition that an illegally composed selection board cannot produce lawful decisions. Consequently, the court held that the corrections board had acted arbitrarily and capriciously in failing to void the initial passovers of the plaintiff officers. Id.

In Hary v. United States, 223 Ct. Cl. 10, 618 F.2d 704 (Ct. Cl. 1980), the officer was passed over for promotion in the Air Force and separated from active duty. He sought relief from the Air Board, alleging that certain OERs in his record were erroneous, requiring their removal from his record and resubmission of his case to other selection boards. The Air Board refused to remove the contested OERs and denied Hary's petition for correction. Hary brought suit in the Court of Claims. Because the Air Board had applied the "but for" test rejected in Sanders, the court restated the test to be applied. In order to prevail, the claimant must show that the alleged defect in the proceedings

> substantially affected the decision to separate him or relieve him from active duty, or at least he must set forth enough material to impel the court to direct a further inquiry into the nexus between the error or injustice and the adverse action.

Hary, 618 F.2d at 707. Rather than remand the case to the Air Board for application of the proper test, the Court of Claims applied the test itself. In so doing, the court held that two of the contested OERs satisfied the burden placed on the claimant. Id. at 708. Next, the court assessed whether the error caused by the one faulty OER was "harmless" to the passover decisions. To do so required the court to "canvas for ourselves the evidence in the administrative record in the light of the arguments and analyses offered by the parties." Id. at 709. Although the court disclaimed operating as a "super selection board in passing on this problem of the connection between the defective OERs and the likelihood of plaintiff's selection for promotion," id. at 710, it then assessed and compared comparative rating scores and records of Hary and other officers. Id. at 710-11. The court ultimately concluded that "it is quite likely that the plaintiff would have failed to be promoted to permanent major in

1971 and 1972 even if the [defective] OERs had not been in his record." Id. at 711. In short, after assessing the government's rebuttal to the officer's prima facie case, the error of the two OERs was held to be harmless. Id. ("Any error in the selection process was therefore harmless").

We need only pause briefly over Evensen v. United States, 228 Ct. Cl. 207, 654 F.2d 68 (Ct. Cl. 1981), since it is a reprise of Doyle. In Evensen, the officer was initially passed over by regular selection boards. On petition from Major Evensen, the Army corrections board agreed that his passovers were infected with erroneous OERs. The board recommended that the officer be presented, on a corrected record, to a STAB for promotion consideration. The STAB, however, was populated with the same officers that had composed the initial selection boards, quite in violation of applicable regulations. The Court of Claims held, citing Doyle, that the harmless error rule of Sanders is inapplicable to the error of composition of the STAB, and that, as in Doyle, the correct remedy is automatic voiding of the initial passovers. Evensen, 654 F.2d at 72.

Our recitation of the pertinent Court of Claims cases ends with Engels v. United States, 230 Ct. Cl. 465, 678 F.2d 173 (Ct. Cl. 1982). Like Hary, Engels did not involve fundamental process error in the composition of the board, but instead necessitated application of the harmless error rule. The court restated the rule to clarify that the burden on the officer is to make a prima facie showing of nexus between the alleged error in his record and the passover decision. Engels, 678 F.2d at 175. The final burden of persuasion "falls to the Government to show harmlessness--that, despite the plaintiff's prima facie case, there was no substantial nexus or connection." Id. Even though the corrections board had erroneously applied the discarded "but for" test, the court proceeded to the merits of the dispute as in Hary, deciding that the plaintiff had met his burden. Id. at

176. Turning to the government's case, the court asked the quintessential military promotion question: whether it "is unlikely that he [Engels] would have been promoted in any event." Id. After an extensive examination of the details concerning the relative merits of Evensen's promotion prospects, the court concluded that the government had failed to carry its end burden, and that Evensen thus could not be deemed properly passed over by his selection boards. Id. at 178. Thus, as in Hary, the court decided the merits of the promotion issue, and concluded that the officer must be reinstated with back pay until such a time as he was correctly discharged. Id. at 180.

From this body of law, we can reach certain judgments, at least insofar as they pertain to cases arising on similar facts before SSBs were available to assist in the officer selection process. Instances of fundamental error, at least those affecting the composition of the deciding body, are not susceptible to review under the harmless error test. See Doyle, 220 Ct. Cl. 285, 599 F.2d 984 (1979); Evensen, 228 Ct. Cl. 207, 654 F.2d 68 (1981). Presumably because the civilian corrections board can correctly and assuredly measure the depth of the wrong in such cases, that is, when there can be no doubt that the error undermines the outcome, the remedy of voided passovers, reinstatement and back pay follows as of course. See, e.g., Doyle, 599 F.2d at 1004.

In cases that pit the officer against his military superiors in the debate over whether the officer is relatively more qualified than other officers competing for promotion, our predecessor court had little choice but to formulate and employ either the "but for" test or the "harmless error" test, in order to analyze the facts at hand. As the opinions in the foregoing cases make quite clear, it makes no sense to order relief for a corrections application that alleges an error lacking any impact on the passover decision. See, e.g., Sanders, 594 F.2d at 813. But because error that is not

"harmless" begs for correction, the decision and rule in Sanders was necessary to decide the fundamental promotion/non-promotion issue. Id. at 816. The Court of Claims candidly recognized that the "but for" test urged by the government would turn the court (as well as the corrections board) into a super selection board, and thus necessarily enmesh the court in the basic promotion issue when such a decision of a corrections board was challenged. Id.

That the harmless error test would paradoxically force the civilian corrections boards and the court into the same obligation to make essentially military promotion decisions became quite evident from the court's decisions in Hary and Engels, which reflect judicial resolution of the fundamental promotion issue. Hary, 223 Ct. Cl. 10, 618 F.2d 704 (1980); Engels, 230 Ct. Cl. 465, 678 F.2d 173 (1982). With no statutory tool available to resolve the basic promotion issue, the Court of Claims' resolution of the issue left the civilian corrections boards and the courts in the middle of decisions that are fundamentally military in nature.

The case law does reveal one instance in which a corrections board could satisfy its duty to correct records under section 1552, in a passover situation, without using the harmless error test in such a manner as to make itself into a super selection board. The case is Braddock v. United States, 9 Cl. Ct. 463 (1986). After two nonselections for promotion, Braddock was discharged from the Army. He petitioned for correction of his records, asserting the presence of faulty OERs in his record before the selection boards that passed him over. The corrections board agreed, recommending removal of the faulty OERs and that Braddock's record be presented to a STAB "for an advisory opinion as to whether plaintiff's consideration by the original selection boards was prejudiced by the errors [in his record] . . . ." Id. at 466. In the Army, the STAB was a creature of regulation and

standard operating procedures, and existed to advise the Secretary on promotion matters and to "test and determine whether the error in the officer's records was prejudicial or harmless." Id. at 467. The STAB concluded that Braddock would not have been promoted in any event. Later, the corrections board confirmed its decision not to void the passovers and Braddock's discharge.

Because the corrections board declined to void Braddock's two passovers and his discharge before recommending that he meet a STAB, he brought suit alleging that such action was required, under the Court of Claims case law discussed above, when faulty OERs were removed from his record and his case was sent to the STAB. The Claims Court disagreed. By sending Braddock's record to the STAB—[a] panel of military officer[s]--for a recommendation on Braddock's promotion prospects, the corrections board had simply deferred its decision on whether to void the initial passovers until it had advice from the military on the essentially military question of promotion. The Claims Court found "nothing wrong with this procedure." Id. at 473. The Claims Court thus viewed the process in Braddock as an application of the harmless error test by the corrections board that did not require the corrections board or the court to become involved in the comparative officer qualification issue. In the end, the harmlessness of the error caused by the faulty OERs was shown by the corrections board's acceptance of the STAB's decision that Braddock would not have been promoted even on a correct record. See id. at 469. Taking comfort with the process in the case, the Claims Court noted that "Congress basically ratified the STAB process when it enacted 10 U.S.C. § 628 in 1980." Id. at 474.

VI

We must now measure the decision of the Court of Federal Claims in light of sections 1552 and 628 and the pre-

DOPMA case law. The issues framed from the decision of the Court of Federal Claims and by the briefs raise an issue of interpretation of section 628, addressed in part A below, and other issues that draw their breath from the interaction of sections 1552 and 628 and the pre-DOPMA case law. Those issues are considered in parts B, C, and D.

A

Purely as a matter of statutory construction, the Court of Federal Claims concluded that an SSB, at the request of a corrections board, may only consider the record of an officer twice passed over and discharged if the officer is at least constructively reinstated. According to the court, in order to effect such a constructive reinstatement the corrections board is required to actually or implicitly void the two passovers that forced the discharge. The court came to its conclusion because the statute affords access to an SSB to "an officer who is eligible for promotion who was considered for promotion by a selection board but was not selected . . . ." 10 U.S.C. § 628(b)(1) (1994). To be "eligible" for promotion, the court concluded that the officer must be on the active duty list, which in Porter's case would have required actual or constructive reinstatement. Porter essentially repeats this view in urging affirmance of the Court of Federal Claims.

The government responds that Porter overlooks the pertinent legislative history and fails to appreciate that section 628 acts to turn the clock back to the date of the original selection board passover decisions in order to assess the officer as of the time of the initial selection board decisions, when the officer was on the active duty list. As noted earlier, the legislative history, although sparse, is clear in stating its purpose: to make a "reasonable determination" whether the officer would have been promoted if his records originally had been seen untainted by material error. See H.R. Rep. No. 96-1462, at 73 (1980). Thus, we can be certain that Congress

intended for discharged officers to have access to SSBs. The statutory language, however, speaks only of officers "eligible" for promotion. On the face of that language, an officer challenging his first passover before discharge after a second passover would still be "eligible" for promotion as an active duty officer, whereas the officer passed over twice and discharged would lack access to an SSB for want of eligibility for promotion.

We think it unlikely that Congress intended with the use of the word "eligible" to draw a line between officers once passed over and those twice denied promotion, allowing the latter access to an SSB only if they are by a fiction constructively reinstated to the active duty list. We reach this conclusion because of the certain retroactive character of the SSB deliberative process. Consequently, we interpret the word "eligible" in section 628(b) to mean eligible as of the time of the consideration of the officer's record by the selection boards whose decisions are later challenged. Porter thus, as a matter of statutory interpretation, was "eligible" for consideration by the SSB without the need to reinstate him, actually, constructively, or by "deemed" action of a reluctant corrections board, the latter being the avenue to the SSBs paved for Porter by the Court of Federal Claims.

We thus conclude and hold as a matter of statutory interpretation that nothing in section 628 requires the constructive reinstatement--via the purge of at least one of the two passovers from the officers' record--of a twice passed over and discharged officer in order to present the officer's record to an SSB.

B

The government presents the following argument. The Air Board is authorized by section 1552 and the regulations promulgated thereunder to receive and pass upon

applications from current and past Air Force military personnel for the correction of their military records. This authority extends to all military records, and the authority of the Air Board to recommend corrections to the Secretary is unfettered. According to the government, the Air Board is empowered to use its authority with sound discretion. As an example of such sound discretion, the government asserts that the Air Board may, in appropriate cases, recommend that a twice passed over and discharged officer's record be corrected to remove the passovers and void his discharge. The government posits that such action would be taken by the Air Board when it is certain that a discovered error before an officer's previous selection boards necessarily led to the officer's nonselection. The government does not catalog the entirety of such situations, noting only that such would appear to be the case if an applicant's military record contained another officer's unfavorable disciplinary action report. Without deciding, we might speculate that other kinds of error would qualify for an Air Board conclusion that the demonstrated error vitiates the initial passovers. Matters such as impermissible consideration of race, sex or religion, or instances of an illegally composed selection board (one thus incapable of producing a legal result) come to mind. For such matters, the civilians on the Air Board possess the competence and confidence to make a correct decision and recommendation without judging the competing qualities of specific military experience records. With regard to cases presenting only the issue of relative promotability of officers, when a corrections board has already corrected the officer's military experience record, however, the government draws a line. For such situations, the government asserts that nothing in either section 628 or section 1552 prohibits the Air Board from refusing to void previous passovers when recommending that the officer meet an SSB for an assessment of his relative promotion prospects, based on his cleansed record and records of officers who met the original

boards along with the protesting officer. In this respect, we agree with the government's reading of the pertinent statutes.

The government also complains that the insistence of the Court of Federal Claims that the Air Board perform a harmless error analysis itself, and the court's sua sponte performance of that task in the face of the unwillingness of the Air Board, carries the civilian Air Board and the courts into the impermissible zone of military decisions that are reserved to the military, absent legal error in the promotion decisions.

From the government's perspective, the solution to unwanted intrusion of the courts into the military business of promotion is to recognize that the harmless error test from the pre-DOPMA cases is unnecessary for fair consideration and decision of applications to the Air Board in challenging the legality of previous passover decisions. In cases in which the error is found to be egregious, when the Air Board is sure of the need to void previous passovers, we may assume the Air Board will exercise its full authority. For such cases, the harmless error test is unnecessary and inapt, as the Court of Claims reasoned long ago in Doyle and Evensen. See Doyle, 220 Ct. Cl. 285, 599 F.2d 984 (Ct. Cl. 1979), Evensen, 228 Ct. Cl. 207, 654 F.2d 68 (Ct. Cl. 1981). But in cases in which the Air Board lacks the confidence to make a fundamentally military promotion decision, such as this one, the Air Board is not obligated to resolve an officer's promotion prospects by performing a harmless error analysis. Instead, the Air Board may recommend that the fundamental promotion determination be made by the SSB. If the SSB decides in favor of the officer, that decision binds the Secretary, and the Air Board will make the necessary corrections to the record, as specified in section 628. If the SSB determines that nonselection is appropriate, then, as occurred in this case, the Air Board stands ready to receive and decide any complaints

an officer may assert concerning the process and decision of an SSB.

The government advances its view of the Air Board's authority as preserving all of the Air Board's section 1552 powers, while at the same time extricating the courts and the civilian correction boards from the unwelcome situation in which passover adjudication placed them before the enactment of section 628. Nothing in the government's argument, or in our decision in this case, limits in any way the authority and duty of the Air Board to correct the substantive contents of an officer's record as it exists before a promotion board, including SSBs.

Against the government's arguments, Porter raises several protests. First, Porter faults the government for shifting legal theories in the course of the long court proceedings in this case. According to Porter, the government agreed that this is a harmless error case early on, and the government cannot prevail because, according to Porter, it has never rebutted Porter's prima facie case that the errors in his record are not harmless. Porter's frustration in keeping up with an evolving set of legal issues over a long time does not, however, rise to the level of error on the government's behalf. Porter also defends the view of the Court of Federal Claims that only officers on the active duty list are eligible for consideration by an SSB. For the reasons stated in part A of this section, we reject that reading of the statute.

Porter also argues that the statutory test for referral to an SSB, which is "material error of fact," in this case means an error which is not harmless under the Sanders-Hary-Engels analysis. Porter's argument is flawed. First, Porter recognizes that an officer's record can be sent to an SSB by the military command itself, without a recommendation from the corrections board. Because no one argues that the harmless error test applies to the military command, Porter states that

the military command can invoke an SSB on the showing of "mere material error," something less in degree of impact on initial passover decisions than "non-harmless" error. Thus, Porter would have a two-level meaning for the statutory words: "mere material error" in one instance, and full blown "non-harmless error" when access to an SSB is recommended by a corrections board. To state Porter's argument discloses its weakness: such a two-tiered meaning for a statutory word is unacceptable because it would create two statutory avenues to an SSB when the law specifies only one. Cf. 10 U.S.C. § 628.

At the heart of Porter's case is his firm conviction that the harmless error test introduced by the pre-DOPMA case law--under which he presumably would be entitled to voidance of his two passovers before he was sent to the SSBs--survives the enactment of section 628 and is still necessary to produce fair and equitable consideration of officers' records by selection boards. Porter also argues that the government's position would undercut the section 1552 powers of the Air Board. In particular, Porter asserts that the Air Board has the entire duty and responsibility under section 1552 to recommend correction of military records, and that therefore any reliance on an SSB to assist in the records correction process is an unlawful abdication by the Air Board of its statutory duties.

Stated differently, Porter's argument is that, without implementation of the harmless error test as a mandatory feature of the Air Board's processes, the Air Board shirks its duties under section 1552 by losing control of the corrections process. This loss of control, he says, is seen in the failure to force the civilian corrections board to decide the military promotion issue, and in allowing the SSB to make the records correction decision. We disagree.

The Air Board must act on an officer's petition for correction. When the officer asks that previous passovers be voided, the Air Board must respond with a decision. In appropriate cases, we may assume that the Air Board will exercise its discretion to void passovers. If the Air Board recommends that an officer's record be sent to an SSB without first voiding earlier passovers, the Air Board retains control over the petition for correction and is authorized and obligated to review the actions of the SSB on application from the officer, as occurred in this case. Nothing prevents the Air Board from considering fundamental flaws of an SSB, such as the Doyle-Evensen type, or other material error that might be involved in an SSB decision. If the Air Board stays action on a request to void passovers pending action by an SSB, it must subsequently grant or deny the request to void the initial passover to close out the petition for correction. That the Air Board does not lose control of the corrections process pending action by an SSB is evident, because the Air Board must be able to act in the event material errors of a procedural, factual, or compositional nature infect the SSB deliberations.

Porter's view of how the Air Board must operate once it finds a material error of fact requiring correction in the record of a twice passed-over officer is also subject to practical criticism. As is clear from the case law exegesis above, performance of the harmless error test requires the corrections board to act as a kind of selection board. Assuming, post-section 628, that a corrections board employed the harmless error test and concluded in favor of the officer, it would, on Porter's view, then in essence recommend that the same kind of analysis be performed again by the military SSB. A certain duplication of effort would seem inescapable and to no beneficial end.

As we have stated above, in light of the lack of any statutory command to extend use of the harmless error test to section

628 cases, the government urges us to discard that test. We take care to note that the government does not ask us to overrule the Sanders-Engels line of cases. As a panel of this court, we of course are bound by the law of our predecessor court. South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982). If the government's argument prevails, however, we may understand those decisions as not applicable to the case before us, because of the change in law governing the review of twice passed-over officers.

C

We think it is possible, though less desirable, to force this case into the harmless error analytic construct, as the government seems to have urged at the early stages of the litigation. As described in the following paragraphs, we consider and reject this possibility. Such forcing would posit that the corrections board must make a harmless error determination in every case, but that it only makes that decision after an SSB has made its decision on the promotability issue. If the SSB decides in favor of promotion, the analysis would conclude that the government had failed to prove that the material error that drove the case to the SSB was harmless. If the SSB decided against promotion, the harmlessness of the error would have been shown.

The harmless error rule of the old cases leads to many complexities, and in the end has enmeshed the civilian corrections boards and the courts in the essence of promotion vel non judgments. Retaining the harmless error test for cases such as this, however, carries the prospect that the line dividing the military and the courts will become blurred if not pierced. Thus, we perceive some considerable risk in forcing the SSB process into the harmless error mold.

At the same time, we think there is little genuine gain to the military personnel selection process by retention of the harmless error construct. Under section 628, a passed-over officer--including an officer discharged after two passovers--has access to an SSB on a showing of "material error." See 10 U.S.C. § 638(b). As that term is understood by the government, it means an error that, in the opinion of military command or a corrections board, might have affected the outcome of selection board decisions. On such a showing, an officer's record would go before an SSB, which is authorized by law to make a promotion decision that will bind the military command and the Secretary of the military department. Civilian corrections boards retain their full powers to correct military records in order to insure that the promotion system is operated fairly and according to governing statutes and regulations. Even without the harmless error construct, corrections boards have ample authority and responsibility to guarantee that an officer's record will be substantially complete and fair when presented to selection boards, and that the processes of selection boards, including SSBs, will not be arbitrary, capricious or contrary to law.

We see nothing in section 1552 nor in section 628 that stands in the way of the government's argument. Proper allocation of civilian and military duties and responsibilities is advanced by the government's position. The pre-DOPMA law on which the Court of Federal Claims relied need not be applied to the circumstances of this case. The harmless error test, while necessary to adjudicate cases such as this before the enactment of section 628, is not only unnecessary now, but grafting it onto section 628 is sufficiently problematic for us to reject that possibility. In cases such as this, the harmless error rule has no application.

Because the powers of the Air Board are not circumscribed by section 628, we emphasize that the Air Board's duties and responsibilities are not reduced when it invokes assistance from an SSB in responding to a petition for correction of military records. In order for an SSB to perform lawfully, it must yield--as Congress expected--a "reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error." See H.R. Rep. No. 96-1462, at 74 (1980). We note that the same kinds of questions that may be raised about the records presented to, and the procedural operations of, regular selection boards can be raised about the records before, and procedural operations of, an SSB. When such questions are presented to a corrections board on a petition to correct a military records created by an SSB, the corrections board is bound by statute to decide the questions presented. Section 1552 of title 10 conveys broad authority to the corrections boards regarding how they may exercise their statutory responsibilities, and contains no prescriptions on how they may fulfill their statutory charge. Therefore, the Air Board is not required to decide whether an error of a regular selection board was not "harmless" under the pre-DOPMA case law when recommending that a passed-over officer meet an SSB, in order to receive--after the fact--a reasonable determination of his prospects for promotion on a corrected record. Rather, in the post-DOPMA context, the Air Board may exercise its section 1552 authority by following the statutory directive in section 628(b)(1)(A); that is, convening an SSB upon determining that "the action of the [original selection] board which considered the officer was contrary to law or involved material error of fact or material administrative error."

However, section 1552 imposes the ultimate responsibility on the corrections board to assure that, if utilized, a section 628 SSB produces a reasonable determination of the officer's promotion prospects. If an officer meets an SSB unsuccessfully and can point to a material flaw in the SSB's procedures arguably undermining the SSB's nonselection judgment, he may petition the corrections board to alter or void the SSB's decision. After an SSB has made its decision, the focus of the corrections board's attention under section 1552 is on whether the process by which the SSB reached its decision afforded the officer a "reasonable determination" of his promotion prospects. Indeed, in this case, Porter challenged the lawfulness of the 1993 SSBs in essence on the ground that he was deprived of a "reasonable determination" because of alleged imperfections in the benchmarks and scoring used by the SSBs. The Air Board was in error when it suggested that the response to Porter's challenge would better be given by an SSB. As the Air Board's Second Addendum demonstrated, the Air Board was capable of deciding Porter's procedural challenge without having to decide whether Porter was or was not better qualified for promotion than the officers selected and not selected by the CY84B and CY85A captain promotion boards. Instead, as the Air Board noted, Porter's allegation of the SSB's use of impermissible supercompetitive standards failed for lack of factual support, because of other factual information in the record that undercut Porter's claim that an impermissible supercompetitive standard had been applied to him.

The foregoing responds to Porter's argument that the Air Board abdicates its statutory duties under section 1552 by recommending invocation of an SSB without coupling the SSB recommendation with voidance of previous passover decisions. Because the civilian corrections board is obligated to recommend voidance of SSB decisions only when it concludes that the process before an SSB has not yielded a

reasonable determination that the officer would have been denied promotion initially even with an untainted record, the use of an SSB in this case was consistent with, and satisfied, the responsibility of the Air Board under section 1552.

The civilian boards for correction of military records are no less the guardians of the military promotion process after DOPMA than they were before DOPMA. The promotion interests of military personnel that were protected by corrections boards in the past remain protected when an SSB is used as part of the records correction process. Because of DOPMA, however, the methodology of corrections boards may dispense with the old and mooted harmless error inquiry, and instead focus on whether an SSB has achieved its statutory function of producing a reasonable determination of the officer's original promotion prospects. In a nutshell, the interaction between section 1552 and 628 shifts the focus of attention of a civilian corrections board from the relative promotion prospects of one officer over others to the fairness of the process by which an SSB has decided the promotion issue in a given instance.

Finally, we assure the parties that we have fully considered their other arguments in support of their positions and have determined that the other arguments do not affect, undercut, or stand in the way of our ultimate conclusions.

Conclusion

In cases such as this, the Air Board is not required by statute or case law to void the initial passovers, with the attendant consequences, when recommending that the officer's record be submitted to an SSB. The Air Board's decision to deny Porter's request for voidance of his initial passovers in this case is therefore not arbitrary, capricious, unsupported by substantial evidence or contrary to law. Porter was lawfully

discharged from the Air Force in 1985. The judgment of the Court of Federal Claims is reversed.[2]

REVERSED

[2] Porter argues, in a conditional motion to remand to the Court of Federal Claims for further proceedings, that this court should not "defer" to the views stated in the Second Addendum without first remanding the case to examine the circumstances by which the Second Addendum was written. To the extent that we agree with any view stated in the Second Addendum, we do so as an independent matter of statutory interpretation. The conditional motion to remand is denied.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5007

GREGORY C. PORTER,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

ORDER

January 20, 1999, Decided
January 20, 1999, Filed

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on January 27, 1999.

Chief Judge MAYER did not participate in the vote.

FOR THE COURT,
/s/
Jan Horbaly
Clerk

Dated: January 20, 1999

cc: Armando Bonilla
Kathleen J. St. John

PORTER V US, 97-5007
(CFC - 91-1008C)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 91-1008C

(Filed December 30, 1992)

****

GREGORY C. PORTER, *

*

Plaintiff, *

*

v. *

*

THE UNITED STATES, *

*

Defendant. *

****

Order

Defendant's motion for summary judgment is granted in part and denied in part, and this case is remanded to the Air Force Board for Correction of Military Records (AFBCMR). See 28 U.S.C. § 1491(a)(2) (1988) ("In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.")[1]

[1] Remand to a correction board is appropriate when the administrative record is not sufficiently developed for the court to make a reasoned judgment. See Hary v. United States, 618 F.2d 704, 710 (Ct. Cl. 1980).

Facts

Plaintiff was commissioned in the United States Air Force Reserves and entered active duty on March 5, 1981. He was promoted to the rank of first lieutenant on March 5, 1983. Plaintiff was not selected by the two selection boards considering him for promotion to the rank of captain, which were convened on July 23, 1984 (CY 84 B) and January 21, 1985 (CY 85A). On August 31, 1985, plaintiff was honorably bur involuntarily discharged from the Air Force, pursuant to the "up o. out" requirements of 10 U.S.C. §§ 627 and 631 (1988)[2] and Air Force Regulation (AFR) 36-12 (1 October 1984).[3]

---

[2] 10 U.S.C. § 627 (1982) provides (in pertinent part):

> [a]n officer . . . [who] is considered but not selected for promotion by a selection board . . . shall be considered to have failed of selection for promotion.

10 U.S.C. § 631(a)(1982) provides (in pertinent part):

> (a) . . . each officer of the . . . Regular Air Force . . . who holds the regular grade of first lieutenant and has failed of selection for promotion to the regular grade of captain for the second time . . . whose name is not on a list of officers recommended for promotion to the next higher regular grade shall--
>
> > (1) be discharged . . . not later than the first day of the seventh calendar month beginning after the month in which the President approves the report of the board which considered him for the second time . . . .

[3] AFR 36-12 (1 October 1984), paragraph 3-20, reads:

> Reserve Officers on the Active Duty List Not promoted to the Next Higher Grade
>
> > Reserve officers in the grade of first lieutenant, captain, or major who fail selection for promotion to the next higher grade for the second time must be released from extended active duty no later than the last day of the sixth month after approval of the report of the board which considered them for the second time . . . .

On September 26, 1984, after the decision of the first selection board, plaintiff applied to the AFBCMR to request that his Officer Effectiveness Report (OER) for the period July 3, 1983 to January 2, 1984 be voided and removed from his records, and that the nonselection recommendation of the CY 84B Board be voided, on the grounds that his supervising and rating officials had treated and rated him unfairly. The records submitted to the AFBCMR included numerous letters from other officers to substantiate his claim that he was unjustly placed in a "no win" situation as Chief of Personnel Utilization during that period and was "set up" as a "scapegoat" for longstanding deficiencies in the command. (The contested OER rated his promotion potential 2-2-2, whereas Mr. Porter's most recent OERs commencing in October, 1980, consistently ranked him at the top of the scale in almost all rating categories and at 1-1-1 for promotion potential.)

On August 22, 1985, the Assistant Secretary of the Air Force, on behalf of the Secretary, accepted the AFBCMR's conclusion that "the applicant's contentions [are] well supported by statements from personnel knowledgeable of applicant's character and integrity, his leadership and management skills, his professional qualities, his ability and potential for greater responsibility [which] . . . are sufficient to overcome the rationale expressed by the Air Staff [that Mr. Porter would not have been promoted in any event]," see defendant's exhibits (DX) at 143, and ordered that: the January 2, 1984 OER be declared void and removed from his record; the CY 84B and CY 85A selection boards' recommendations be voided; and Special Selection Boards (SSBs) sitting for the CY 84B and CY 85A boards reconsider plaintiff for promotion to the rank of captain.[4]

---

[4] 10 U.S.C. § 628(b)(2) (1982) (in pertinent part) requires an SSB to evaluate the record of the officer being reconsidered by considering his

The SSBs convened on March 24, 1986 to sit for the CY 84B and CY 85A boards determined that Mr. Porter would not have been selected for promotion by either board.

Through, inter alia, a November 17, 1987 request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1988), and an April 18, 1988 conversation with the captain heading the SSB staff appeals section (Mr. Porter was authorized to tape the conversation, and transcribed and appended it to his application to the AFBCMR), Mr. Porter attempted to ascertain the basis for these passovers. He was informed that the cut off scores for the CY 84B and CY 85A boards had been destroyed and that "this information does not exist," see DX at 73; that the records of selected and nonselected officers who met the boards were privilege and exempt from disclosure under FOIA, 5 U.S.C. § 552(b)(2), (5), and (6)

---

record as it "would have appeared," if corrected, "to the board that considered him," and by comparing that record "with the records of a sampling of those officers of the same competitive category who were recommended for promotion and those officers who were not recommended for promotion, by the Board that considered him."

The sampling consists of the records of the officers whose records received scores identical to the cut-off score (the so-called "gray zone" records at the score at which the quota was filled). The records of all the officers in the gray zone are rescored to determine which will make up the remainder of the quota. The government states that the practice (it apparently is not set out in regulations or other published guidance) is for an SSB to be provided--from one of the panels before the original board (e.g., the most representative panel)--the records of the top five in the gray zone who were selected (not necessarily the five immediately above the recalculated cut off score) and a random five from those in the gray zone who were not selected (similarly, not necessarily the five immediately below the recalculated cut off score). In this case, according to the response to plaintiff's Freedom of Information Act request, the SSB for the CY 84B board considered three records (out of a possible total of ten, five selectees and five nonselectees) and the SSB for the CY 85A board considered four records (out of a possible total of nine, five selectees and four nonselectees).

and AFR 12-30, par. 10b, e and f, and that their disclosure "would interfere with the congressional mandate under 10 U.S.C. § 628[5] and AFR 36-89." DX at 72.

On March 11, 1988, Mr. Porter applied again to the AFBCMR for the correction of his record, alleging: prejudice before the SSBs from the gap created by removal of the voided OER; that his duty titles were incorrect both on his June 1984 OER and on his Officer Selection Brief (OSB), and that, as a consequence, his duty as Chief, Personnel Utilization (CPU) was not reflected anywhere on his record before the SSBs; and that a Letter of Evaluation (LOE) dated March 14, 1984, attached to an OER dated November 16, 1984--and written by the same reviewer who wrote the voided OER--repeated the substance, and thus perpetuated the negative effect, of the removed OER.[6]

Mr. Porter disputed whether his records had been compared with those of the appropriate officers considered by the CY 84B and CY 85A boards as required by 10 U.S.C. § 628, see supra note 4, since he had been told those officers' records or scores did not exist or were destroyed.

He also requested that his records be compared with all officers considered for promotion by the CY 84B and CY 85A boards (not just those in the "gray zone").[7] As evidence of improper consideration by selection boards, he alleged

---

[5] See supra note 4.

[6] This LOE thus appears not to have been before the CY 84B selection board; it is not clear whether it was before the CY 85A board. It appears not to have been in the record before the 1985 AFBCMR.

[7] This request is beyond the AFBCMR's or this court's power to grant, since it conflicts with the statutory requirement that his record be compared with a "sampling" of the officers selected and nonselected by the original board. See 10 U.S.C. § 628; supra note 4.

that a lieutenant whose records fluctuated more than his was selected for promotion to captain.

He demanded "reinstatement" at the rank of captain, back pay and allowances at that rank, and, upon reinstatement, removal of a May 1985 OER.[8]

The AFBCMR denied Mr. Porter's application on February 10, 1989, by decision dated April 24, 1989, concluding: "as we have not found that the [SSBs] acted improperly or on erroneous information, we have no basis to recommend that their decisions be set aside." On August 30, 1990, the AFBCMR also denied his request for reconsideration.

Plaintiff's voluminous pro se complaint in this court, filed on March 12, 1991, repeats most of the allegations in his application to the AFBCMR, and essentially alleges that the AFBCMR's action on his application was arbitrary and capricious.

Mr. Porter seeks damages of $20,559,799.33, consisting of: active duty wages and medical benefits (apparently at the rank of captain) until his projected retirement, forty years of retirement wages at the rank of captain, nominal damages of $5,000,000.00, compensatory damages of $6,000,000.00 and punitive damages of $7,000,000.00, plus taxes on "all monies received" in this court, plus attorneys' fees, and a jury trial.[9]

---

[8] The government is granted summary judgment on this claim because plaintiff has submitted no basis for controverting the AFBCMR's determination that the May 1985 OER was not a matter of record before the SSBs.

[9] This court cannot award "nominal," compensatory, or punitive damages. See Nortz v. United States, 294 U.S. 317, 327 (1935) (in employee pay cases this court cannot award nominal damages); Garner v. United States, 230 Ct. Cl. 941, 943 (1982) (no authority to award punitive damages); United States v. Severin, 99 Ct. Cl. 435, 443 (1943)

Discussion

Jurisdiction

This court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1988), to render judgments for pack pay due to unlawful separation based on the statute mandating the rate of pay for the position from which the employee is wrongfully discharged, i.e., the plaintiff's statutory entitlement, but for the illegal separation, to that pay. See United States v. Wickersham, 201 U.S. 390 (1906); Engels v. United States, 678 F.2d 173, 175 (Ct. Cl. 1982). (In Mr. Porter's case, the pay mandating statute is 37 U.S.C. §§ 203 and 204(a)(1) (1988).)

In cases under its Tucker Act jurisdiction, the court also, to provide an entire remedy and complete the relief afforded by the judgment, may issue orders directing restoration to office or position and correction of records, or remand to the administrative or executive body or official. 28 U.S.C. § 1491(a)(2)

(no authority to award nominal damages). Nor can it award retirement benefits. See Austin v. United States, 206 Ct., Cl. 719, cert. denied, 423 U.S. 911 (1975) (court may not order relief beyond the duration of a service member's enlistment).

Plaintiff's request for a trial by jury also is beyond the power of this court to grant. By filing a complaint in this court, a plaintiff is deemed to have waived any Seventh Amendment right to a jury trial. The nonjury review process of this court is constitutionally permissible as a condition of the sovereign's waiver of its sovereign immunity. See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1566-68 (Fed. Cir. 1990) (citing Murray's Lessee v. Hobokan Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855)). See also Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (Seventh Amendment right to trial by jury does not apply in actions against the Government.).

Standard of Review

Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that there is an absence of evidence to support the non-moving party's case. See Sweats Fashion, Inc. v. Pannil Knitting Co., 833 F.2d 1560, 1563 (Fed. Cir. 1987), citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988).

In considering defendant's motion for summary judgment, the court must view the evidence , and draw inferences therefrom, in the light most favorable to the nonmoving party, Mr. Porter. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1961); Olde Tyme Foods, Inc. v. Roundy's, Inc., 961 F.2d 200, 202 (Fed. Cir. 1992).

In opposing the motion for summary judgment, Mr. Porter, as the non-movant, may not rest on his conclusory pleadings, but must "proffer countering evidence sufficient to create a genuine factual dispute," Sweats Fashion, 833 F.2d at 1562. The proffered evidence must be sufficient for the trier of fact reasonably to find in favor of the non-movant. Anderson, 477 U.S. at 249.

Scope of Review

Mr. Porter must overcome the rebuttable presumption that the "administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith, Arens, 969 F.2d at 1037 (citing Sanders v. Unites States, 594 F.2d 804, 813 (Ct. Cl. 1979)), by demonstrating by cogent and clearly convincing evidence that the AFBCMR acted arbitrarily, capriciously, contrary to law, or that its determination was unsupported by substantial evidence.

Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992) (citing Wronke v. Marsh, 787 F.2d 1569, 1576 (Fed. Cir.), cert. denied, 479 U.S. 853 (1986). See also Chappel v. Wallace, 462 U.S. 296, 303 (1983). A court cannot substitute its judgment for the military's when reasonable minds could reach differing conclusions based on the same evidence. Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983).

Correction of Records by AFBCMR

Record correction may be required when the plaintiff makes out a prima facie case that there was a significant error in his record before a selection board and that there was a "causal nexus" between that error and the board's nonselection. See Engels, 678 F.2d at 176; Hary v. United States, 618 F.2d 704, 710 (Ct. Cl. 1980).

Two questions are relevant when determining whether there is a "causal nexus" between an alleged error in the record before a selection board such as to warrant reversal of the Secretary's decision (accepting a correction board recommendation) to uphold the selection board's nonselection recommendation: (1) did the error make plaintiff's record appear worse than it otherwise would have appeared, and (2) if so, is it unlikely that he would have been promoted in any event. Engels, 678 F.2d at 176; Hary, 618 F.2d at 710.

On the first question, plaintiff has the burden of proving that there existed errors in the record or other factors adversely affecting the rating process that had no business in the rating process, or a clear violation of a specific objective of a statute or regulation, or a misstatement of a significant hard fact. Hary, 618 F.2d at 708. Once a plaintiff presents enough evidence to establish the likelihood of causation, the burden shifts to the defendant to show that, even without the

errors, plaintiff would not have been promoted. Engels, 678 F.2d at 177-78.

The AFBCMR's function is authorized by 10 U.S.C. § 1552(a) (1988), which provides that "[t]he Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record . . . when he considers it necessary to correct an error or remove an injustice." The department may pay any claim for pecuniary benefits found to be due on account of the claimant's service in the military as a result of correcting a record under § 1552(a). See 10 U.S.C. § 1552(c) (1988).

The Air Force regulations establishing and governing the operation of the AFBCMR are set out at 32 C.F.R. § 865.1 et seq. (7-1-85), and at AFR 31-3, § B, par. 9a (31 May 1985). They provide (in pertinent part):

> The function of the Board is to consider all applications properly before it to determine the existence of an error or an injustice and, when appropriate, to make recommendations to the Secretary of the Air Force.

32 C.F.R. § 865.2(b). Also:

> The Board shall have jurisdiction to review and determine all matters properly brought before it, consistent with existing law.

32 C.F.R. § 865.2(c).

> "[E]ach application [for correction] and the available military or naval records pertinent to the corrective action requested" "will be reviewed" by the

> AFBCMR in order to make its determination as to what AFBCMR action is required. AFR 31-3, § B, par. 9A. (Emphasis added).

The AFBCMR is required by its procedural regulations to make written determinations, which "will include . . . all facts of record, and statement of ground(s) upon which the Board's determination is based." 32 C.F.R. § 865.7(d) (in pertinent part) (emphasis added).

While Congress under 10 U.S.C. § 1552 has conferred broad powers on the Secretary of the Air Force to remedy errors and injustices through the AFBCMR, the statute imposes "a duty as well as the power to afford servicemembers proper relief." See Sanders, 594 F.2d at 812. Notwithstanding his broad discretion in interpreting statutory requirements, the Secretary is bound by any regulations he promulgates thereunder. See Voge, 844 F.2d at 779.

The Secretary of the Air Force must correct any military record if it contains a legal error consisting of his failure to comply with the regulations he promulgates. See Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990); Voge, 844 F.2d at 779 ("It has long been established that government officials must follow their own regulations ..."). This court has authority to review secretarial decisions made through the AFBCMR. Sargisson, 913 F.2d at 920.[10]

---

[10] Congress has long contemplated that a court would be permitted to review the actions of boards of correction. The court in Sanders stated:

> Action under 10 U.S.C. § 1552, except when procured by fraud, was made final and conclusive on officers of the United States, but not on the courts of the United States. A specific provision limiting review was stricken in order to permit judicial review "under appropriate circumstances." Hearings Before a Subcommittee of the House Committee on Armed Services on H.R. 1182, 82d Cong., 1st Sess. 369, 377, 391-93, 398, 401, 450 (1951) .... Indeed, "[t]he fact that this court has the jurisdiction to review actions of military

Plaintiff's assignments of errors by the AFBCMR

1. Improperly constituted SSBs

Mr. Porter's allegation that the SSBs were not properly constituted is based on a misapprehension as to the applicable statute. 10 U.S.C. § 8362 (1988), requiring half the board to be reserve officers, is not applicable to reserve officers on the active duty list, as was Mr. Porter. See 10 U.S.C. § 8396 (1988).

One member of the SSB board was in the reserves, as Mr. Porter has conceded. Thus, the applicable statute, 10 U.S.C. § 266 (1982), and the regulations thereunder,[11] 32 C.F.R. Part 41, App. A, Part 3C 5A.2 (1986), appear to have been met.

However, even if there were a violation of 10 U.S.C. § 266, this issue was raised by Mr. Porter for the first time in this litigation, in his "Notice of Discovery" filed shortly before defendant's motion for summary judgment. Because the issue was not raised to the AFBCMR, it may not be the basis for a decision by this court. See Doyle v. United States, 599

---

corrections boards is not disputable (Citations omitted.) This was so even before our authority to correct records was made explicit in 1972 by amendment of 28 U.S.C. § 1491. (Citations omitted.) Sanders, 594 F.2d at 810.

[11] 10 U.S.C. § 266 (1982) requires "at least one member of the Reserves, with the exact number . . . determined by the Secretary concerned in his discretion."

The regulations thereunder, at 32 C.F.R. Part 41, App. A, Part 3C 5a.(2) (1986), provide:

> If the respondent is an enlisted member of a reserve component or holds an appointment as a reserve commissioned or warrant officer, the Board shall include at least one Reserve officer as a voting member. Voting members shall be senior to the respondent's reserve grade. See 10 U.S.C. 266.

F.2d 984, 100 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980) ("a party cannot raise an issue on appeal to a court when it failed to raise it before an administrative agency competent to hear it."); Tannehill II v. United States, 18 Ct. Cl. 296, 302 (1989) (applying the rule in Doyle to the AFBCMR).

2. Errors in the record

a. Gap in record

A gap in a record resulting from the removal of an OER may be a basis for invalidating a selection board decision based on that record, see, e.g, Sanders, 594 F.2d at 314. However, it is not considered harmful if the gap is explained. Yee v. United States, 512 F.2d 1383, 1386 (Ct. Cl. 1975). Plaintiff does not dispute that a page was inserted in his record before the SSB to explain the gap created by removal of the January 1984 OER, and conceded at a status hearing held in August, 1992, that it was an "adequate explanation," see id. at 1386-88.

b. LOE reiterating voided OER

Mr. Porter contended to the AFBCMR that a March 14, 1984 LOE "indicate[d] problems which existed from the last evaluation period" (the OER for which was voided by recommendation of the 1985 AFBCMR). See supra note 6. Mr. Porter's August 16, 1988 letter, responding to the Air Staff reports to the AFBCMR, also states that the LOE indicates problems in the previous rating period (for which the OER was voided) and that the LOE "would hurt [his record] just as much as the OER being in the records."

The March 14, 1984 LOE covering the period January 3, 1984 to March 11, 1984, which immediately follows the period of the voided OER, was written by the same officer

who wrote the voided OER. The LOE was attached as a "supplemental evaluation sheet" to the November 16, 1984 OER, in which Mr. Porter received the highest ratings in every category, including "1-1-1" for promotion potential. The LOE sets out Mr. Porter's duty title during this period as Chief, Career Progression (CCP), a post he assumed in December 1983, and, in one eleven-line paragraph, states (in pertinent part):

> Mr. Porter has continued to maintain his duty performance during this reporting period. With continued guidance and assistance his judgments and decisions are effective. Although he was recalled from leave because of an omission in tying loose ends together in his section prior to taking his leave, he took the initiative once it was brought to his attention. Recent manning problems in one of his work centers required that he roll up his sleeves and become a technician . . . . Lt. Porter seems to be putting forth a concerted effort to improve his writing ability and an overall improvement has been noted during this time frame . . . ."

DX at 12 (Vol. III of III).

The comments on the voided OER, which ranked his promotion potential as "2-2-2," and lowered rating items 2, 3, 8, from the highest level, "well above standard," which he received on his previous and subsequent OERs, to the third highest level, "meets standard," included:

1. At item 2, Judgment and decisions: "Adequate." "With guidance and assistance, renders consistently accurate and sound decisions."

2. At item 3, leadership: "Responsibility and initiative usually displayed under pressure. Takes action promptly after being assured he is right. Tries to be fair and consistent with subordinates."

3. At item 8, Written communications: "Sufficient. Written work usually requires editing . . . ."

Clearly, the March 1984 LOE refers back to the period of the voided OER (during which both the "omission in tying loose strings together" and the "manning problems" occurred). It also clearly repeats (verbatim at item 2) the negative comments in the voided OER regarding his judgment and his writing ability, and makes other comments "damning him with faint praise." As Mr. Porter contends, the LOE appears to signal the very problems that the Secretary's order voiding the January 1984 OER was supposed to remove from promotion board consideration. The LOE errors thus appear equal, in significance and materiality, to the errors on the voided OER.

The only explanation provided by the AFBCMR for its decision that Mr. Porter was not entitled to have the LOE removed was because Mr. Porter's August 16, 1988 response to the Air Staff's report (recommending denial of relief) "did not provide any data which substantiates that the LOE is in error or unjust" and because "the military record ... reveals no irregularities causing an injustice to the applicant."

This explanation ignores the ample evidence of error or unjustness revealed by the foregoing textual comparison of the contents of the LOE with the very similar OER that the 1985 AFBCMR concluded was "in error or unjust." More discussion than the conclusory statement set out above (or

the conclusory statements in the Air Staff opinions) is needed to withstand review of this AFBCMR determination under an arbitrary or capricious or "substantial evidence" standard of review and to comply with the requirement of 32 C.F.R. § 865.7(d) (1985) (AFBCMR's determinations "will include . . . statement of ground(s) upon which determination is based.").

c. Erroneous duty history

Mr. Porter asserts that he was prejudiced by an erroneous duty history because his officer selection brief (OSB) before the SSB, which contained his duty assignment history, eliminated his promotion as Chief Personnel Utilization (CPU), from June 13, 1983 until October 11, 1983, and showed him instead as Chief, Customer Assistance Section (CCAS) until July 3, 1983 and as "Special Assistant to Chief, CBPO" (SAC/CBPO) from July 4, 1983 until December 11, 1983. DX at 118.[12]

He claims, however, that he was not appointed as SAC/CBPO until October 11, 1983--and that he served as such for only two months, until December 11, 1983.

He also claims that his July 2, 1983 OER should have shown him as CPU, rather than as CCAS, his previous position, because he left the CCAS position by June 13, 1983.

[12] DA PAM 600-3 4.9g Special Selection Boards states that "SSBs generally are not approved because of erroneous entries or omission on the Officer Record Brief "because the entitlement in AF 624-100 submit a letter to the board is "considered sufficient opportunity to overcome minor administrative deficiencies." The errors alleged by Mr. Porter do not appear minor, however, and his previous attempts to correct these errors, commencing with his application to the 1985 AFBCMR, have been unavailing.

In his complaint, as in his August 16, 1988 letter responding to the AFBCMR's request for comments on the 1988 Air Staff letters, Mr. Porter claims that the omissions are significant (in his experience as a personnel officer) because, whenever the promotion board reviews a duty history, "they look for progression and diversity, not digression" and they will note a problem from a position change from "section chief" to a "special assistant." He maintains that the LOE is a "key indicator" to the SSB of a prior problem.

The existence of these errors is clear from the record before the 1983 AFBCMR, which also was before the 1989 AFBCMR, and appears significant because it omitted all mention of his actual, subsequent (presumptively higher level) position as CPU during that period, and showed that he served as a (lower level) special assistant for three months longer than he did.

The AFBCMR determination on this issue was as follows:

> insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. The evidence relating to the applicant's allegations of incorrect duty titles does not overcome the advice of the Air Staff indicating compliance with regulatory provisions.

The Air Staff advice to the 1988 AFBCMR states only the legal rule that an OER must show the duty titled held on the report period close date. However, its conclusion -- that the title used on Mr. Porter's OER closing on July 2, 1983 was correct under that rule--begs the very question raised by Mr. Porter, because it assumes--without setting out any explanation or grounds therefore--that his duty title on that date actually <u>was</u> CCAS, rather than CPU.

Mr. Porter, notwithstanding the Air Staff letter, does not appear ever to have contended that the OER should not be dated on the close date, July 2, 1983, or that it should show a position other than that held on the close date. Rather, he alleges classic, factual record errors--that his correct duty title on July 2, 1983 was not CCAS, but CPU, and that he served as CPU from June 3, 1983 to October 11, 1983.

The evidence in the record before the AFBCMR that Mr. Porter's OSB and OER erroneously omitted his duty as CPU from June 13 to October 10, 1983 is as follows:

1. Mr. Porter's application to the 1985 AFBCMR (which also was before the 1989 AFBCMR) states: "I would report to Cap. Foley, 8 Oct. 83, at 7:30 hours. It was determined that I would no longer be DPMU;" and "After my assignment back to the CBPO on 8 Oct. 83, I was assigned as the Special Assistant to the Chief, CBPO, Capt. Foley." See DX at 514, 515.

2. Air Staff report #MPCAOB, dated December 1984, from Lt. Col. Douglas G. Barclay to the 1985 AFBCMR, states that Mr. Porter was not in fact designated SAC/CBPO until October 1983, and concedes both the backdating alleged by Mr. Porter and the effect of such backdating on his duty record. The Air Staff letter states:

> The AF Form 2095 at attachment two shows the applicant was designated as assistant to the CBPO Chief on 11 October 1983. However, it is interesting to note the change [from CPU to SAC/CBPO] was backdated to 3 July 1983, the effective date of

> personnel utilization duties. Although not improper, backdating the change to 3 July 1983 essentially voids any record of the applicant in the position of Chief Personnel Utilization. We do not know why this was done and the applicant does not comment on this matter. We can only conclude the change was backdated in the interest of the applicant to "camouflage" the fact that he had been relieved of duty.[13]

DX at 120. (Emphasis added.)

3. The official record before the AFBCMR, as submitted by the defendant, contains two personnel action forms signed by Mr. Porter as CPU, one for Mr. Donald Deramus, on June 13, 1983 (DX at 663, 702) and one for Mr. Theodore Dye, on June 28, 1983 (DX at 664, 703). According to these forms, Mr. Porter was not at CCAS on July 3, 1983, as the OER and OSB would indicate.

4. Finally, Mr. Deramus' statement on Mr. Porter's behalf, submitted to the 1985 AFBCMR and thus in the record that apparently was before the 1988 AFBCMR, confirms that Mr. Deramus began working

---

[13] Because the Air Staff opinion recommended that Mr. Porter's January 1984 OER not be voided, and that recommendation was rejected by the 1985 AFBCMR, it is not clear whether the 1985 AFBCMR agreed with or accepted any portions of the opinion. Whether the admitted backdating is not "improper" under Air Force rules and regulations is an issue for the AFBCMR, in the first instance, to decide. See infra note 14.

under Mr. Porter's supervision on June 13, 1983. DX at 732.

Notwithstanding ample evidence in the record before the AFBCMR that Mr. Porter's factual contentions are correct, and that his records before the SSB were not (there is only one piece of (equivocal) evidence to the contrary--a copy of a record with a typed-in, apparently retroactive, correction (which the aforementioned Air Staff letter admitted was "backdated" to "camouflage" the facts)),[14] his contentions simply have never been addressed, either by the Air Staff opinion, or the AFBCMR.

Given the absence of any written facts or grounds to support the AFBCMR's determination that Mr. Porter's duty records omitting his duty as CPU were correct and the ample evidence in the record before the AFBCMR to the contrary, this court cannot grant summary judgment that the AFBCMR did not act arbitrarily or capriciously or that there is substantial evidence to support its determination dismissing Mr. Porter's allegations of record errors.

The pleadings before this court also present no evidence (or rationale) to support the AFBCMR's determination that the duty descriptions in Mr. Porter's record before the SSB were not erroneous.

In fact, the government does not explicitly argue that they were not erroneous. Nor does it argue that these errors were "insignificant." Instead, echoing the disregarded Air Staff opinion to the 1985 AFBCMR, the government contends that

---

[14] The record with the altered duty date, showing the date of June 13, 1983 crossed out and replaced by July 3, 1983 date, is at DX at 662. According to Mr. Porter, records cannot be corrected in this fashion; rather, a new form, making the correction, must be added to the record. There is no such form in the records provided by the defendant.

the "overall effect" of the errors was harmless, and may even have been "advantageous" to Mr. Porter, because they "camouflaged" the fact that he had been relieved of his duty as CPU. Therefore, the government contends, Mr. Porter has not sustained his burden of showing that there was a causal "nexus" between the errors and his nonpromotion, citing Engels, 678 F.2d at 177 and Hary, 618 F.2d at 709.

Defendant, however, misapprehends the proper allocation of burdens of proof on this issue. Once plaintiff has demonstrated that a significant error exists, i.e., a "misstatement of significant hard fact" or an error that shows his record to be "something less than 'substantially complete and fair,'" Hary, 618 F.2d at 709, (citing Sanders, 594 F.2d at 814)--and this court cannot conclude as a matter of law on this record that these errors (the erroneous duty records of the presence of the LOE) were not significant--the burden shifts to the government to establish that the error(s) in fact were harmless, i.e., did not affect the nonselection, e.g., because plaintiff would not have been selected anyway. See Engels, 678 F.2d at 175 ("end-burden of persuasion falls to Government to show harmlessness" once plaintiff makes prima facie case of an incomplete or inadequate military record before a promotion board, because defendant has "far greater knowledge of the facts, statistics, and operations of the promotion selection process [and] is in much better position to produce evidence and materials showing the lack of adequate nexus."); Sanders, 594 F.2d at 816 ("the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place").

Not having conceded the OER or OSB errors, neither the AFBCMR nor the government, understandably, has made any attempt to present facts or grounds sufficient for determining that, even with the errors, the SSB would have reached the same decision regarding Mr. Porter's likelihood of promotion by the original selection boards.

This opportunity may be presented on remand. However, the government's burden would appear to be somewhat heavy in this case, given the high proportion of selections (ninety-five percent) authorized to be made by each of the two original selection boards and the apparently high caliber of Mr. Porter's record before (and after) the period of the prejudicial LOE and OER.[15]

Even if, as government counsel conjectured, there was significant inflation of officers' OER ratings in the years at issue, neither this evidence nor any evidence that, notwithstanding such ratings, Mr. Porter's record placed him in the bottom five percent of his promotion class appears to have been before the AFBCMR.[16]

As the evidence in the record of the government's standard form correspondence to Mr. Porter at the time of his nonselections strongly implies, the duty assignment errors alleged by Mr. Porter relate to significant evaluation factors. See DX at 115 (government letters to Mr. Porter announcing his nonselection stating that "performance, breadth of experience, job responsibility and professional competence" were factors other than OERs that were considered by the selection boards in determining an officer's potential for performance); cf. DA PAM 600-3, ¶5-1 OER System

---

[15] His OER promotion potential ratings, for example, were consistently at the highest level (1-1-1) from his October 1980 OER forward and on only ten percent of the ten rating factors on his OERs for that period did any rating drop below the top level, "well above standard" (and then never below the "above standard" level). Further, according to Mr. Porter, only two percent of the lieutenants considered for promotion to the rank of captain have complete the Marine Corps Command and Staff College, as he did. See DX at 104.

[16] There has been no suggestion that Mr. Porter was not "fully qualified" for promotion, but only that he was not among the ninety-five percent of his promotion class "best qualified" for promotion.

Overview (10 July 1984 Update) (in pertinent part) (emphasis added) (Officer qualifications "focus on the officer's background in terms of his experience and expertise and include such items as specialty qualification, successful performance in demanding positions, civil and military schooling and physical profile.")

Further, because the SSB's and the AFBCMR's "harmlessness" determinations would require consideration of plaintiff's comparative position before the selection boards," see Hary, 618 at 710, it is difficult to understand how either board could make such a determination without some evidence regarding the records or scores of the officers with whom Mr. Porter was compared, even in summary form. However, as stated before, there is no record before the court that any such evidence was presented to the AFBCMR. Nor is there any record of how the SSB ensured that the record "samplings" used, as required by 10 U.S.C. § 628, were in the gray zone for the original boards.

This court also cannot conclude that defendant's argument that Mr. Porter actually was "benefitted" by not having his relief from duty appear on his record constitutes substantial evidence to support an AFBCMR determination of "harmless error." Not only was this issue not raised to or considered by the AFBCMR, it was not set forth as written grounds for its determination, as required by its governing regulations. See 32 C.F.R. § 865.7(d) (1985).

The government's after-the-fact argument of harmlessness does not appear sufficient to support a legal determination to that effect because it assumes that the error of omitting a positive record may be fully excused by another error--that of omitting a negative record. In other words, two errors make it right.

However, there is no authority in 10 U.S.C. § 552 or the regulations thereunder for not correcting one error merely because its effect may be "offset " by another. Cf. Weiss v. United States, 408 F.2d 416, 419 (Ct. Cl. 1969) ("If a Service Secretary place[s] before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information, then the record is not complete and it is before the Selection Board other than as the statute (the predecessor to 10 U.S.C. § 615(3), requiring presentment to the boards of "the pertinent records . . . of each officer whose name is submitted to the board" requires.").

Rather, the government's harmlessness argument would appear to eviscerate the purposes of the statute mandating correction of records, 10 U.S.C. § 1552. (There also is no explanation from the government of the basis for its assumption that the relief from duty, if prejudicial and incorrect, as well as the erroneous LOE and OSB duty records, could not both have been corrected without sacrificing Mr. Porter's entire record of service at the CPU post, which appears to have been exemplary, albeit performed under most difficult circumstances.)

3. Improper "gray zone" comparison

Plaintiff has conceded that he has no direct evidence that the SSB failed to compare his record, as required by 10 U.S.C. § 628 and AFR 36-5 ¶3-6f(4) (1991), with that of the officers in the "gray zone" for the CY 83B and CY 84A boards. See supra note 4.[17]

---

[17] AFR 36-5 § 3-6f(4) (15 November 1991), like 10 U.S.C. § 628, provides, in pertinent part: "The officer's record will be compared with a sampling of records of officers of the same competitive category who were and who were not selected by one or more of the original boards."

The fact that one of his original selection boards may have promoted an officer less highly qualified than he, even if true (defendant has not conceded that the officer exists or, if so, that her official records are accurately represented by plaintiff), is not presumptive evidence of impropriety by the SSB sitting in its stead.[18]

On the other hand, the AFBCMR did not rebut, or even address, Mr. Porter's contention, that there no longer existed any scores indicating which officers were in the gray zone before the original selection boards, e.g., because these were destroyed.[19] This contention is supported by government

---

[18] Further, under the regular approved procedures by which selection boards make their decisions, and, in the ordinary course of events, a slightly more qualified candidate in the same pool may be nonselected by a different panel of the selection board considering that pool. That is because each selection board is divided into panels, each of which receives a random but proportionate share of the total pool, and a proportional quota of the total promotion quota (ninety five percent in this case). Because, statistically, the panels cannot be identical, one panel's quota necessarily will be reached at a lower or higher ranking than another. Thus, as plaintiff conceded at oral argument, of two candidates with identical records, one may be selected and the other nonselected simply because they were before different panels of that board. Similarly, if the "representative" panel used by the SSB see supra, note 5, was different, a candidate with a record identical to that of an officer who was recommended by an original selection board may legitimately not be recommended by the SSB.

[19] The Air Force also relied on Freedom of Information Act exemptions in denying Mr. Porter's requests for the records with which his was compared by the SSB. DX at 72. However, the denial does not explain why the release of redacted records (or the "composite" assessment for each officer requested by Mr. Porter) was not possible without jeopardizing the personal privacy and deliberative process protections of the relied upon exemptions in (b)(2), (5) and (6) of the Act. 5 U.S.C. § 552(b)(2), (5), (6). Certainly, in other military passover discharge cases,

statements in the record before the AFBCMR provided to this court by the government in the appendix to its motion for summary judgment.[20]

While the AFBCMR concluded that, "On the basis of the evidence, it appears that ... the board members fulfilled their obligation to evaluate [Mr. Porter's] record against a sampling of the records of officers who were and were not selected by the regularly scheduled boards," (emphasis added), it did not identify any evidence supporting this conclusion. The government also concedes that the records before the AFBCMR did not include any such evidence (i.e., no transcript of the SSB's deliberations or any record (or summary) of the officers' records that were compared with Mr. Porter's or of their scores,[21] or any other evidence, e.g., a statement by the SSB that the SSB compared Mr. Porter's records to the records required by 10 U.S.C. § 628).

Similarly, in determining that Mr. Porter had "not provided convincing evidence or arguments to show that his corrected record was improperly evaluated," DX at 100, the

---

the AFBCMR, or this court, has had before it, at least in summary or redacted form the records of the officers with which the applicant's records were compared. See, e.g., Hary v. United States, 618 F.2d 704, 710 (Ct. Cl. 1980); Etheredge v. United States, Cl. Ct. 736 (1985).

[20] Exhibit A-6 to plaintiff's complaint, a December 4, 1987 response to his FOIA requests for such records, states that the gray zone scores are exempt from disclosure and were destroyed and therefore "this information does not exist." See DX at 197-99. In a memorandum of his telephone conversation with Captain Debra L. Clark, a staff officer at the SSB, DX at 77-79, she too states that the gray zone scores were destroyed. The AFBCMR also did not address evidence that the OSBs from the original boards were not microfilmed. DX at 148.

[21] The AFBCMR's conclusion that no personal appearance was necessary because of "the availability of the complete record," (emphasis added) is at odds with the government's concession that no gray zone scores (or any evidence of the content of the records of those in the gray zone) were included in the SSB records reviewed by the AFBCMR.

AFBCMR did not explain why the government's statements that the gray zone scores of those whose records were required to be compared with Mr. Porter's under 10 U.S.C. § 628 were "destroyed" or "did not exist" was not evidence of improper evaluation or "convincing."[22]

The absence of any records before the AFBCMR that the sampling required by 10 U.S.C. § 628 was considered by the SSB also raises the question of whether the AFBCMR, contrary to the requirements in the Secretary's regulations, reviewed "the available military records pertinent to the correction action requested, [23] as required by AFR 31-3, § B par. 9a (31 May 1985).

Nor has the AFBCMR set out "facts of record or statement of grounds" as required by 32 C.F.R. § 865.7(d) (1985), to support its determination that those records were properly evaluated by the SSB. See 32 C.F.R. § 865.7(d)(1985) (AFBCMR's determinations "will include ... all facts of record, and statement of ground(s) upon which ... determination is based (emphasis added).

The government asserts that the AFBCMR properly had before it only Mr. Porter's records before the SSB, because the AFBCMR reviews [only] the record before the SSB of the officer applying for correction of his record, to see if his

---

[22] The court is not prepared to conclude that the SSB board members' certifications pursuant to 10 U.S.C. § 628 (c)(12) or a presumption of administrative regularity constitute substantial evidence, notwithstanding inconsistent statements by SSB staff, to support a determination that the required records did exist and actually were considered by the SSB.

[23] The government also has provided no explanation why the full record statutorily required to be before the SSBs, i.e., including records of selected officers in the gray zone before the original selection boards with which the SSB was required to compare Mr. Porter's, see 10 U.S.C. § 628(b)(2), was not "available" or "pertinent" such that AFR 31-3, par. par. 9a would not apply.

record was a "substantially complete and fair" representation of his duty history. This assertion appears to ignore that the AFBCMR's review of the harmlessness of an error necessarily must consider the records with whose the officer's statutorily was required to be compared by the SSB, to determine whether the SSB's conclusion that he would not have been promoted in any event, Engels, 678 F.2d at 177-78, was contrary to law or involved material error.[24]

Even if the government is correct in arguing that the AFBCMR has no authority to review the SSB's harmlessness determination, it cannot argue that the Secretary, on whose behalf the AFBCMR functions, has no authority to review selection board decisions for error or compliance with the law. See 10 U.S.C. § 618(a) (requiring the Secretary to ("shall") return a report to a selection board (or a subsequent selection board) if it "has acted contrary to law or regulations"); see also AFR 36-5, §3-6d(2) (15 November 1991) (the grounds for reviewing the action of a selection board are that: "(a) The action of the board that considered the officer was contrary to law or involved material error of facts or material administrative error, or (b) the board did not have before it for its consideration material information that should have been available had pertinent Air Force Regulations and policies been complied with.").

Conclusion

This Court recognizes that it must defer to the military in its governance of its affairs. See Orloff v. Willoughby, 345 U.S. 83, 93-94, reh'g denied, 345 U.S. 931 (1953) ("judges

[24] While the absence of gray zone records or scores, which are necessary to review an SSB's determination of harmlessness, was not at issue because the AFBCMR never made the antecedent determination that there was an error or injustice in the record before the SSBs, these records would appear to be highly relevant if, on remand, the AFBCMR concludes that the LOE was unjust or the duty errors were material.

are not given the task of running the Army"); Voge v. United States, 844 F.2d 776, 782 (Fed. Cir.), cert. denied, 488 U.S. 941 (1988) ("strong policy reasons compel courts to 'allow the widest possible latitude to the armed services in their administration of personnel matters'") (citation omitted). It also recognizes that there is a strong presumption that the corrections boards faithfully and lawfully discharge their duties. See, e.g., Arens, 969 F.2d at 1037; Hoffman v. United States, 894 F.2d 380, 385 (Fed. Cir. 1990); Sanders, 594 F.2d at 813, and that a corrections board decision should not be overturned absent cogent and clearly convincing evidence. Arens, 969 F.2d at 1037; Wronke, 787 F.2d at 1576.

In this case, however, there seems to have been cogent and convincing evidence before the AFBCMR that the records presented to the SSB were incorrect as to Mr. Porter's duty record and that inclusion of the LOE was an error or injustice comparable to the inclusion of the OER that was voided by the Secretary upon recommendation of the 1985 AFBCMR. The court, therefore, cannot, at the summary judgment stage, and without the benefit of knowing the grounds therefor, conclude that the AFBCMR's determinations--that there was no error as to his duty history or LOE, or that these errors were insignificant or provided no causal nexus to his nonselection, in that they did not make Mr. Porter's record appear worse--are supported by substantial evidence and not arbitrary and capricious.

On this record, the court also cannot uphold a determination (not made by the AFBCMR) that, even if these were errors or injustices they would not have affected the original selection boards' nonselection decisions.

In deference to the role of the AFBCMR, however, the court declines at this juncture to order back pay, a correction of Mr. Porter's record, reinstatement, or other relief. Cf.

Sargisson, 913 F.2d at 922 (substantive merits of decision to reinstate beyond the competence of the Claims Court and non justiciable; Voge, 844 F.2d at 779, 780 (Claims Court without jurisdiction to conduct substantive review of military determinations entrusted to military, even indirectly, but only to review for procedural errors.)

Instead, the AFBCMR is accorded another opportunity to support its determinations regarding Mr. Porter's allegations, as discussed above. These determinations shall be based upon the record before the SSB,[25] including the records with

---

[25] The court is not persuaded by, but need not reach at this time, defendant's contentions, in response to the court's May 29, 1992 order to submit all of the records before the AFBCMR, that the entire record before the SSB (specifically, the records of the officers in the gray zone, with whose records Mr. Porter's was required to be compared) need not (and may not) be provided to the AFBCMR, and need not be provided to this court, because both are precluded by 10 U.S.C. § 618(f) from reviewing such records. (10 U.S.C. § 618(f) provides: "[e]xcept as authorized or required by this section, proceedings of a selection board convened under § 611(a) . . . may not be disclosed to any person not a member of the board.")

Clearly, the Secretary must be deemed to be "authorized" under this section (specifically, under subsection (a)(1) thereof), to review such records in order to carry out his mandate in subsection (a)(1) to "review" AFBCMR "reports." See 10 U.S.C. § 618(a)(1) (1988) (Secretary "shall review" reports of a selection board to determine whether the board "has acted contrary to law or regulation or to guidelines" and make a "determination" thereon.)

In fact, the authority of the AFBCMR to review in camera documents, protected by the Privacy Act or other privilege or protection from disclosure, was alluded to in a letter from the Deputy Inspector General of the Air Force to Mr. Porter, denying him access but stating: "if [the AFBCMR] believe the documents you requested are needed to rule on your petition, they may request the documents for review in camera and safeguard them from unauthorized release." DX at 301.

The AFBCMR acts on the Secretary's behalf and is required by statute to review records for error or injustice. See 10 U.S.C. § 1552(a). It is inconceivable that the AFBCMR in that capacity may not review everything in the record before a selection board or SSB, since it would

not otherwise be able to carry out its statutorily delegated responsibility to recommend correction of the SSB or selection board's records. See 10 U.S.C. § 618(a)(1) (1988); see also AFR 31-3, § 9a (31 May 1985) mandating that a panel of the AFBCMR review "[e]ach application and the available military or naval records pertinent to the corrective action requested." Nor would this court be able properly to apply the standard of review mandated by the cases binding this court—arbitrary or capricious or unsupported by substantial evidence—without any record of the SSB record before the AFBCMR. See also 10 U.S.C. § 618(a) (requiring the Secretary to return selection board report if board "acted contrary to law or regulations"); AFR 36-5, § 36d(2).

The court also does not decide whether, if such records were not protected (or could not be redacted), Mr. Porter was entitled to those records in filing his AFBCMR application, under 32 C.F.R. § 865.8(e) which provided (in pertinent part):

> that an applicant to the AFBCMR "shall have access to such official records as are deemed necessary to adequately present his case" and puts the responsibility on the applicant to procure only "such evidence not contained in official records." (Emphasis added.) Also, 32 C.F.R. § 865.16(a) provides that, at the AFBCMR's request, "the appropriate staff office will assemble the original or certified copies of all available military records pertinent to the correction action requested."

Defendant's assertion at the August 11, 1992 hearing that the court in Law v. United States, 26 Cl. Ct. 382 (1992) decided that a correction board may not be required to consider all the records before an SSB in order to comply with its mandate under 10 U.S.C. § 1552 was misinformed. The decision does not deal with this issue, or with SSBs at all.

The absence of any provision in 10 U.S.C. comparable to a provision in the Privacy Act of 1974 permitting disclosure of otherwise protected agency records at the order of court, see 5 U.S.C. § 552a(b)(11), also is not, as defendant argues, conclusive on whether Congress intended to preclude court review (in camera, at least) of AFBCMR records (or of SSB records before the AFBCMR). Rather, it appears to support equally well the opposite proposition—that even protected agency records may be released to a court.

Defendant also has not explained why military personnel records, properly redacted, should be subject to a greater degree of protection than the Privacy Act or FOIA, 5 U.S.C. §§ 552, 552a, accord to other government records.

The Privacy Act exemption most apposite to this situation, see 5 U.S.C. 552a(7) (emphasis added), in fact, permits exemption (by rule) of

which Mr. Porter's record was compared, as necessary to determine whether there was a significant error or injustice in Mr. Porter's records or, if there was, whether it was harmless, in that he would not have been promoted in any event. The AFBCMR's decision on remand shall set out the full evidentiary basis or other rationale for these determinations.[26] Cf. Massachusetts Trustees v. United States, 377 U.S. 235, 246 (1964) ("grounds not relied on by a government agency cannot be invoked to validate an

---

"evaluation material used to determine potential for promotion in the armed services," only to the extent that their disclosure "would reveal the identity of a source who furnished information to the government under an express promise [of confidentiality]."

The exception permitted by 5 U.S.C. § 552a(6) also seems not to apply, since it protects only promotion "testing or examination material (emphasis added), and is applicable only if the material is used "solely to determine individual qualifications for promotion."

The DoD and Air Force regulations under these Privacy Act exemptions merely repeat the standards of the statute. See, e.g., 32 C.F.R. § 310.52(a), 5 C.F.R. § 297.501(b).

Further, redacted records, which apparently would satisfy the SSB's needs under 10 U.S.C. § 628, are not "records" subject to Privacy Act protections at all, because, by definition, they do not "contain [an individual's] name, or . . . other identifying particular assigned to the individual." See 5 U.S.C. § 552a(a)(4).

While the SSB regulations provide that SSB scores "are internal working papers, are exempt from disclosure, and are destroyed as soon as the Secretary approves the Board proceedings," see AFR 36-5, § 3-6 (in pertinent part), the Secretary's authority to permit such destruction under the Privacy Act is not clear, and is not asserted in the Department's Privacy Act regulations.

[26] The AFBCMR also shall determine whether any information similar to the composite assessment sheet allegedly compared by the Air Force Personnel Center, attached as Exhibit 29A to plaintiff's complaint, which the government conceded at oral argument "should not be before the [SSB]" or an allegedly improper and revoked letter of reprimand ordering Mr. Porter's placement in a weight reduction program were in fact part of the records before either SSB. While both these issues were raised in Mr. Porter's application to the AFBCMR, the AFBCMR decision did not address them.

exercise of administrative discretion which has in fact been based on insufficient grounds") (citations omitted).
If, on remand, the AFBCMR determines that there were one or more significant errors in the records before the SSB, it shall make whatever recommendations to the Secretary it deems appropriate, including reinstatement, back pay, correction of records (including, but not limited to, voiding the SSB decisions), and another opportunity to be considered by an SSB sitting for the CY 84B and CY 85A selection boards.[27]

---

[27] Neither this court nor the AFBCMR, however, unilaterally may grant Mr. Porter's request for a promotion to the rank of captain. This court cannot substitute its own criteria for that of a selection board or an SSB in promotion decisions. See Orloff, 345 U.S. at 83; Kien v. United States, 227 Ct. Cl. 772, 776 (1981).

While the AFBCMR may recommend a promotion, it may not actually promote a member of the military service, retroactively or prospectively. See 10 U.S.C. § 616 (1988) (Recommendations for promotion by selection boards); 10 U.S.C. § 617(a) (1988) ("selection board . . . shall submit ... report ... containing a list of the ... officers it recommends for promotion"). (Emphases added). Rather, promotions of general officers must, by statute, be reviewed by a military chain of command (the Secretary of the department, the Secretary of Defense), and submitted to the President "for his approval, modification, or disapproval," see 10 U.S.C. § 618(b) and (c) (1988); see also 10 U.S.C. § 616(d). Only after the board's recommendation is approved by the President may the names selected by the board be placed on the promotion list. See 10 U.S.C. § 624(a)(1) (1988). Further, the President may remove from the list the name of an officer recommended for promotion by a selection board. Cf. 10 U.S.C. § 618(d) (1988). (While the President has delegated his authority under 10 U.S.C. § 624(c) he has reserved his removal authority under 10 U.S.C. § 618(c). See Executive Order No. 12396 §§ 1(a), 1(g), 3, Dec. 9, 1983, 47 F.R. 55897, 55898.)

Thus, even if an officer were placed on a promotion list by a selection board or an SSB, this would not assure his actual promotion to that rank until the statutorily required review was conducted.

Awarding back pay damages corresponding to the rate allocable to any rank above that of first lieutenant also would be beyond this court's power, because its jurisdiction is based upon the statute setting his rate of pay at his rank at the time of

Plaintiff's brief, if any, regarding the effect of the AFBCMR's decision on remand--or the Secretary's, see 32 C.F.R. §865.21 (1989)--shall be filed within thirty days of the filing of such decision in this court.

/s/

DIANE G. WEINSTEIN
Judge, U.S. Court of Federal Claims

---

discharge or separation. See United States v. Wickersham, 201 U.S. 390 (1906).

In the United States Court of Federal Claims

No. 91-1008C

(Filed October 31, 1994)

GREGORY C. PORTER,

Plaintiff,

v.

THE UNITTED STATES

Defendant.

Order

This case is before the court on cross-motions for summary judgment following remand to the Air Force Board for Correction of Military Records (AFBCMR), Porter v. United States, No. 91-1008C, slip op. at 27-31 (Fed. Cl. Dec. 30, 1992), and nonselection decisions by special selection boards (SSBs) convened in November 1993 for the 1984B and 1985A promotion selection boards. The court denies both motions and remands with the direction that Mr. Porter's record be corrected to show reinstatement at his discharge rank and date and that he be paid the wages and other benefits to which he would have been entitled if he had served at the reinstated rank of first lieutenant for at least the period between (1) his original unlawful discharge pursuant to 10 U.S.C. § 631 [1] on August 31, 1985 (based on voided

[1] Citations to Title 10 of the United States Code are to the edition in effect at the relevant time, unless otherwise stated.

nonselection decisions in CY 84B and CY 85A) and November 15, 1993, when he was nonselected for promotion by the SSBs to [sic] sitting for the CY 84B and CY 85A selection boards.

Background

The pre-remand facts and procedural history are set out in the remand order, and will only be summarized here.

Plaintiff Gregory Porter, a first lieutenant in the Air Force, was not selected by the two selection boards considering him for promotion to the rank of captain, which were convened on July 23, 1984 (CY 84B) and January 21, 1985 (CY 85A). He was then discharged, pursuant to the "up or out" requirements of 10 U.S.C. § 631 and Air Force Regulation (AFR) 36-12, ¶ 3-20 (1 October 1984). Upon plaintiff's application, the AFBCMR concluded that his Officer Effectiveness Report (OER) for the second half of 1983 should be voided and removed from the record, that there was nexus between the erroneous inclusion of the OER and his nonpromotion, and that therefore the 1984B and 1985A nonselection decisions should be voided, and he should be reconsidered for promotion by SSBs sitting for the CY 84B and CY 85A boards.[2] Those SSBs, convened in March 1986, both decided, based on the corrected record as it would have been considered by the original selection boards, not to recommend his selection for promotion.

Plaintiff again applied to the AFBCMR in 1983, alleging that he was prejudiced before the 1986 SSBs by the gap

---

[2] The Secretary of the Air Force (Secretary) accepted the AFBCMR's conclusion that Mr. Porter's record and recommendations were "sufficient to overcome the rationale [of] the Air Staff [that Mr. Porter would not have been promoted in any event]." DX at 143.

created by removal of the voided OER, that the record listed his duty titles incorrectly, and that a Letter of Evaluation (LOE) written by the same reviewer who wrote the voided OER (but attached to a different OER) repeated the substance of, and perpetuated the negative effect of, the removed OER. He also alleged procedural irregularities by the SSBs. After the AFBCMR determined there were no errors and denied the application. He filed suit in this court in 1991 on these and other grounds.

Defendant moved for summary judgment on the grounds that the AFBCMR decision was correct in that there were no errors in his record and no causal nexus between any possible errors and the SSBs' findings that he would not have been promoted. In December 1992, the court held that plaintiff was not prejudiced by the gap in his record but remanded the case to the AFBCMR to consider whether the misstatement of his duty titles and the LOE were errors having a causal nexus with his nonselections by the 1986 SSBs. See. e.g., Engels v. United States, 678 F.2d 173, 175 (Ct. Cl. 1982); Sanders v. United States, 594 F.2d 804, 811 (Ct. Cl. 1979). The court also denied plaintiffs motion for summary judgment based on certain other procedural irregularities.

On remand, the AFBCMR concluded that plaintiff's misstated duty title should be corrected and that the LOE should be removed from the record. The Secretary's designee ordered that plaintiff should again be considered for promotion by SSBs sitting for the CY 84B and CY 85A boards. Neither the AFBCMR nor the Secretary appears to have reviewed the SSBs' decisions, and neither has issued any further explanation of its action on remand or their effect on plaintiff 's claims. Like the AFBCMR in 1986 that voided the 1984B and 1985A passovers, the AFBCMR did not decide, or address, whether compensation was due to Mr. Porter as a result of correcting the nonselections upon which

his discharge was grounded, see 10 U.S. C. § 1552(c) (1988), e.g., for back pay to the date of his unlawful discharge. SSBs convened for each of the CY 84B and CY 85A boards in November 1993 both recommended that he not be promoted.

Defendant has moved for summary judgment on the grounds that the conclusions of the 1993 SSBs show that there was no nexus between the errors in plaintiff's record and the 1986 SSBs' nonselection decisions, and that the 1993 SSBs' procedures suffered no defects. Plaintiff has cross-moved for summary judgment, alleging that there was such a nexus, and that the 1993 boards committed various procedural errors. Plaintiff requests another remand to the AFBCMR for the purpose of considering his objections.

Discussion

Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party must show that there is an absence of evidence to support the non-movant's case. See Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1563 (Fed. Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988). In opposing the motion, the non-movant may not rest on conclusory pleadings, but must "proffer countering evidence sufficient to create a genuine factual dispute." Sweats Fashions, Inc., 833 F.2d at 1562.

Plaintiff appears to protest three procedural irregularities by the 1993 SSBs. First, plaintiff argues that his record should have been compared either to the entire list of candidates for promotion considered by the CY 84B and CY 85A selection boards, or to all the candidates in the gray zone for each

panel of those selection boards, instead of being compared with only ten records from one panel.

The court disagrees. The governing statute requires only that SSBs compare the candidate being reconsidered "with a sampling of those officers of the same competitive category who were recommended for promotion, and those officers who were not recommended for promotion, by the board that considered him." 10 U.S.C. § 628(b)(2) (emphasis added). The most recent regulation governing SSBs, AFR 36-89 (17 April 1992), requires that the records with which the reconsidered record is compared be chosen as follows: "Before destroying the score rosters [from the original selection board], five records from among the lowest scoring selects and five records from among the highest scoring non-selects . . . will be identified. This sampling of records, called benchmark records, will be used if special selection boards (SSB) are required." AFR 36-89, ¶ 16; see also AFR 36-89, ¶ 35b. See generally Doyle v. United States, 599 F.2d 984, 990-92 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980). Thus, the regulation requires comparison with only one set of benchmark records.

Second, plaintiff apparently argues that he was prejudiced by the lack of any explanation to the 1993 SSBs of why his case was being reconsidered: "The ... officer[]s on the SSB[s] would have easily seen that the Plaintiff had not been on active duty since 1985, and could have concluded that something must have happened because normally ninety-five (95%) percent of the 1st Lieutenants are promoted." Plaintiff's Statement of Genuine Issues at 3.

This argument has no merit. First, there is no way to prevent the members of an SSB from being generally aware that "something . . . happened," for SSBs are convened for officers previously passed over for promotion under precisely such a circumstance, i.e., only when the original

selection board acted "contrary to law," committed a "material error of fact or material administrative error" or "did not have before it for its consideration material information." 10 U.S.C. § 628(b)(1)(A), (B); see also AFR 36-89, ¶¶ 31, 33a. Second, the SSBs were specifically instructed not to penalize candidates for "breaks in service for which little or no documentation is available." Def. Ex. 6, Att. at 3. Finally, the records before the 1993 SSBs sitting for the 1984B and 1985A boards should not have included any information regarding plaintiff's activities or status post-1984 or -1985, as the case may be, and plaintiff has alleged no evidence that the records did contain such information. Furthermore any additional explanation of plaintiff's post-1985 records in instructions to the 1993 SSBs might be viewed as compromising the SSBs' responsibilities under 10 U.S.C. § 628(b)(2), which states that the SSB "shall consider the record of the officer as his record, if corrected, would have appeared to the board that considered him," i.e., the CY 84B and CY 85A boards. See also AFR 36-89, ¶¶ 31. 35b.

Third, plaintiff contends that his record was never rescored as required by applicable regulations, but has produced no evidence supporting this assertion other than the evidence from the 1986 SSBs, see DX at 73, that the cutoff scores for the CY 84B and CY 85A had been destroyed or did not exist. An affidavit from the board chief states that each board did in fact rescore plaintiff's record, Def. Ex. 6 at 2, but does not address whether the benchmark records also were rescored. Plaintiff has failed to counter this evidence. See Sweats Fashions Inc., 833 F.2d at 1562.

Defendant, relying on Murphy v. United States, 993 F.2d 871 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 1402 (1994), and Sargisson v. United States, 913 F.2d 918 (Fed. Cir. 1990), argues that the court may not review a substantive determination (the merits of a selection decision) by an SSB, as opposed to reviewing the SSB proceedings for

compliance with applicable procedures. [3] It also claims there is ample record evidence (to wit, the board member certifications required by AFR 36-89, ¶ 15a.) demonstrating that both SSBs were conducted in full compliance with applicable procedures.

---

[3] The cases defendant relies upon in arguing for deference to the service deal with the court's authority to review decisions to release reserve officers from active duty. Such decisions are governed by 10 U.S.C. § 681(a), which states that "the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty." The Federal Circuit held that this court could not review such decisions because there were no standards by which to judge the propriety of the release: "[J]udicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct." Murphy, 993 F.2d at 873 (quoting Sargisson, 913 F.2d ac 922 (quoting Voge v. United States, 844 F.2d 776, 780 (Fed. Cir.) (quoting Greene v. McElroy, 254 F.2d 944, 953 (D.C. Cir. 1953), rev'd on other grounds, 360 U.S.,474 (1959)), cert. denied, 488 U.S. 941 (1988))). See generally Nixon v. United States, 113 S. Ct. 732, 735 (1993). United States v. Munoz-Flores, 495 U.S. 385, 389-90 (1990).

These precedents have no bearing on this case. Tests and standards exist for determining whether the SSBs' decisions not to promote were supported by the record and complied with statutory requirements. These decisions establish only that there was no nexus between the recognized errors in plaintiff's records and his prior nonselections. This court regularly reviews decisions by boards for correction of military records that unsuccessful candidates would not have been promoted even without errors in their records, and reverses the boards if they are arbitrary and capricious, or their determinations are not supported by substantial evidence. Dodson v. United States Gov't Dep't of Army, 988 F.2d 1199, 1204-05 (Fed. Cir. 1993) (stating that BCMR decisions are reviewed by the cited standard); Smith v. Orr, 855 F.2d 1544, 1546, 1553 (Fed. Cir. 1988) (stating that this court has jurisdiction over a claim that a BCMR improperly determined that an unsuccessful candidate would not have been promoted even without errors in his record); see. e.g., Dzialo v. United States, 677 F.2d 873, 875 (Ct. Cl. 1982). If the court can review the AFBCMR, it is not too much to require the AFBCMR to review the SSBs.

Defendant's argument fails to recognize the nature of the Secretary's responsibility upon remand, and the legal effect of the AFBCMR's decision upon remand. The AFBCMR, which unquestionably has the authority to review the SSBs' decisions, pursuant to 10 U.S.C. § 1552, was required on remand to decide whether there were errors in Mr. Porter's records before the 1986 SSBs, and, if so whether there was a nexus between the errors and the 1986 SSBs' nonselection decisions, and whether, and, if so, what, correction of Mr. Porter's records was required by such errors. The AFBCMR upon remand necessarily determined that there were errors in Mr. Porter's records before the 1986 SSBs and, by voiding these SSBs' decisions, that these were material, i.e., that there was a "nexus" between the errors and passovers. See Defendant's Status Report, Ex. A at 2-3. Nevertheless, the government apparently argues that the AFBCMR convened the SSBs sitting for the CY 84B and CY 85A boards, not for the purpose of considering his promotion, but for the purpose of deciding whether there was a "nexus" between the errors before the 1986 SSBs.

This use of the SSBs is improper. First, the SSBs are creatures of statute, however, composed of officers, not advisory bodies of civilians appointed by the Secretary. Nor is an SSB comparable to a stand-by or second look board. See Doyle, 599 F.2d at 990. The SSBs have been assigned no role, by statute or regulation, in performing the correction of record error duties assigned to the Secretary by 10 U.S.C. § 1552 and to the AFBCMR by the Secretary and the regulations thereunder including determining whether there is a nexus between an error and a prior nonselection. The sole purpose of the SSBs is to substitute for a selection board that failed to consider an officer or the decision of which has been voided by the Secretary. 10 U.S.C. § 628(a), (b). The SSBs are constituted solely to make promotion decisions, i.e., to decide sitting as if it were the previous board or SSB, whether to promote the applicant. There is no basis for the

government's suggestion that the AFBCMR may delegate to them deciding whether the applicant "would not have been promoted by the original boards anyway." Further, given the high probability that there was a substantial difference between the benchmarks used by the SSBs and the gray zone for the original CY 84B and CY 85A panels, [4] the 1993 SSBs' decision not to promote, without more, signifies only that the applicant might not have been promoted by the original boards, not that he would not have been promoted even without any errors in his record. See Doyle, 599 F.2d at 996.

The decision as to whether errors have a nexus with a nonselection is reserved to the AFBCMR and the Secretary. Upon voiding a passover, the Secretary is required not only to order new SSBs to sit for the boards issuing the voided passovers, but also to reinstate the officer in the rank he held at the time of his discharge as a result of the now voided passover. See 10 U.S.C. § 631.

Furthermore, upon such retroactive reinstatement, plaintiff becomes entitled to the pay he would have received from the time of such reinstatement. See Engels, 678 F.2d at 179-80 (together with expungement of passovers and of record of

---

[4] The records against which an SSB compares an officer are those of a single panel of the original selection board (chosen, presumably, because it was most representative of the entire board that year, but possibly because it had the highest cutoff or gray zone scores), and these records may be those five in the gray zone who scored the highest of both those who were recommended for promotion and those who were not. Further, the officer's score must be equal to one of the five who passed and higher than all who did not. Therefore, even if an officer's original panel did not have a relatively low cutoff score, and the representative panel against which he is compared was not that of a higher scoring panel of the board for that year, the requirement that his score at least equal one of the highest five results in his being subject to a higher standard than he would have before his original panel.

separation, plaintiff's record also corrected to show that he was retroactively reinstated to active duty as of the date of discharge at the grade he then occupied). See 10 U.S.C. § 1552(c) (authorizing ("may") the Secretary to use current appropriated funds for back pay and other lost benefits "if, as a result of correcting a record under this section, the amount is found due the claimant"); see also 10 U.S.C. § 1552(d). The AFBCMR having failed to do so, either now or in 1985 after vacating the decisions of the CY 84B and CY 85A boards and of the 1986 SSBs, the court orders that his records be corrected to show reinstatement on August 31, 1985, and that he be awarded back pay calculated in accordance with law from that date for up to a year after the AFBCMR's prior correction or until he is passed over twice by selection boards complying with all applicable legal standards. Guy v. United States, 608 F.2d 867, 874-75 (Ct. Cl. 1979) (court cannot order promotion, but does have power to reinstate based on errors having nexus to nonselection decisions resulting in plaintiff's discharge); Doyle v. United States, 599 F.2d at 997 (officer cannot be terminated under the two passover rule unless he has had two fair chances at promotion; he is entitled to his position, rank and pay until terminated under proper authority).

The procedural errors plaintiff has alleged occurred during the 1993 SSB proceedings (specifically, the absence of adequate benchmark records, and proper rescoring of those records) may be the subject of an appeal to this court or another application to the AFBCMR. (Plaintiff raised most of the issues before the AFBCMR in connection with his challenge to the 1986 SSBs.) However, there is insufficient evidence in the record to decide these matters, defendant having opposed discovery pending remand. This court, therefore, pursuant to its remand authority under 28 U.S.C. § 1491(a)(2), orders the Secretary (or AFBCMR) to review the full records before the 1993 SSBs to ensure that the standards of 10 U.S.C. § 628 and AFR 36-89 were met and

specifically decide whether these SSBs' nonselections of Mr. Porter were arbitrary and capricious, unsupported by substantial evidence, or legally erroneous. (De novo review of the merits of plaintiff's or any other individual's promotion decision is not required or appropriate.) Copies of such records, appropriately redacted to eliminate individually identifying information, shall be provided to plaintiff on or before December 1, 1994. [5]

The AFBCMR's review shall be completed and its conclusion regarding propriety of the SSBs' decisions shall be made and reported to the court on or before January 16, 1995. Within thirty days of such report, plaintiff may file his objections, if any, thereto.

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

---

[5] Defendant has previously argued that disclosure of the records before the SSBs is prohibited by law, specifically by 10 U.S.C. § 618(f). The court criticized this argument in its December 30, 1992 order. See slip op. at 27-30 n.25; see also, e. g., Dzialo v. United States, 677 F.2d 873, 875 (Ct. Cl. 1982).

In the United States Court of Federal Claims

No. 91-1008C

(Filed December 30, 1994)

GREGORY C. PORTER,

Plaintiff,

V.

THE UNITED STATES

Defendant.

Order

Before the court is defendant's motion to clarify the court's October 31, 1994 order. This motion (presumptuously) purports to bind the court to defendant's reading of that order, unless the court affirmatively orders otherwise. To the extent that the motion requests the court to adopt the reading of the order set out therein, it is denied. To the extent it requests clarification of the order, it is granted, in part, as stated below only.

Apparently, defendant contends that it would be "inappropriate," until issuance of a final judgment of this court and the exhaustion of any appeals, for the Air Force to correct plaintiff's record of involuntary discharge on August 31, 1985 (when plaintiff was discharged pursuant to the two passover rule in 10 U.S.C. § 631), to reflect, instead, plaintiff's reinstatement to active duty on that date, as ordered on pages 8-9 of the court's October 31, 1994 order.

However, the court's order assumed what the AFBCMR failed to order expressly – that the plaintiff's release records constructively already have been corrected, by virtue of the Secretary's orders that the 1986 and 1993 SSBs "reconsider" the prior selection board and SSB passovers. See, e.g., Evenson v. United States, 654 F.2d 68, 72-73, 75 (Ct. Cl. 1981) (concluding that ordering "reconsideration" for promotion is tantamount to voiding prior passovers, and distinguishing between "constructive active service" and "reinstatement" for purposes of ordering record correction following the voiding of illegal passovers).

Defendant has suggested no basis for the AFBCMR or the Secretary not to recognize that such a correction is the obvious and necessary consequence of "reconsidering" or voiding plaintiff's prior passovers.

If defendant's concern is that the order may be construed to require immediate reinstatement of Mr. Porter, the Court hereby clarifies that the order does not, and may not, require any such action. That is because, until reconsidered (voided), the 1993 SSBs' passovers require termination of Mr. Porter's service within six months of the second 1993 SSB's nonselection of Mr. Porter for promotion (on November 15, 1993), or sometime in May, 1994. See 10 U.S.C. § 631(a)(1) (requiring that an officer be released within six months of his second passover). In short, the 1993 SSBs' nonselections remain in effect until voided, which neither the court nor the Secretary (upon recommendation from the AFBCMR), has ordered at this time, and thus plaintiff does not qualify for reinstatement, constructive or actual, after the May date.

Another factor supporting the court's assumptions that a reconsideration order effectively voids the prior passovers, and that it constructively reinstates the service member in active service as of the date he was discharged, is found in

the statutes setting out the eligibility criteria for promotion consideration by a selection board or an SSB.

These statutes provide that, in order to qualify for promotion consideration, a candidate must be an officer and must be on the active duty list in the permanent grade next below the grade for which he is being considered for promotion. See 10 U.S.C. § 611(a). See also 10 U.S.C. § 628 ("Special Selection Boards") (b)(1) ("In the case of an officer who is eligible for promotion who ... was not selected, the Secretary may convene [an SSB]")(emphasis added); 10 U.S.C. § 628(d)(2) ("An officer who is promoted to the next higher grade as the result of a recommendation of a special selection board shall, upon such promotion, have the same date of rank, ... date for ... pay and allowances of that grade, and the same position on the active-duty list as he would have had if he had been recommended for promotion to that grade by the board which should have considered, or which did consider, him."); 10 USC § 616 ("[a] selection board . . . shall recommend for promotion to the next higher grade those officers considered by the board ... whom the board considers best qualified ...") (emphasis added); 619 ("Eligibility for consideration for promotion") (a)(1) ("An officer who is on the active-duty list ... and holds a permanent appointment in the grade ...") (emphasis added).

In sum, unless Mr. Porter's records had been (at least constructively) corrected to show him as an officer on the active duty list in the permanent grade of first lieutenant, with the requisite time in grade, neither a regular selection board nor an SSB could have been authorized to consider or reconsider his promotion, as was ordered by the Secretary pursuant to the recommendations of the 1985 and 1993 AFBCMRs.

Again, neither the government nor plaintiff has argued that Mr. Porter was ineligible for promotion selection by the

SSBs ordered by the Secretary, or that the Secretary has the authority to disregard the statutory eligibility requirements when ordering an SSB to make a selection decision. Accordingly, the court has assumed that the predicate for ordering the prior SSBs was sound and that the Secretary's orders to reconsider Mr. Porter's promotion did not contravene the statutory requirements that a candidate for promotion be an officer holding a permanent appointment on the active-duty list, e.g., because constructive service accomplished by record correction as an incident to the reconsideration order is a permissible means of meeting such requirements.

Consistent with the foregoing discussion, the court clarifies the October 31, 1994 order by substituting the following for the sentence beginning at the bottom of page 8, and ending at the top of page 9:

> The AFBCMR having failed to do so explicitly, either in 1993 when it vacated the 1986 SSBs' passovers, or in 1985 when it vacated the CY 84B and CY 85A selection boards' passovers, the court assumes that Mr. Porter's records have been corrected constructively to show reinstatement in active duty at the rank of first lieutenant as of August 31, 1985, up until at least six months after his second passover by the 1993 SSB, see 10 U.S.C. § 631(a)(1), (and longer if the 1993 SSBs' decisions are voided by the Secretary at the recommendation of the AFBCMR, or by this court). The court also assumes that, as the result of such constructive duty, Mr. Porter is entitled to back pay for that period, calculated in accordance with law. If the AFBCMR declines to recognize plaintiff's entitlement to such correction or benefits, the court will exercise its own authority to do so.

The government also, at par. 4 of the motion, requests clarification of the "purpose" of the court's order that the value of Mr. Porter's earnings and benefits from his mandatory discharge in 1985 until the convening of the 1993 SSBs be calculated and submitted to the court. The purpose for defendant's attempt to get the court to agree to its construction of the order is not specified, or evident. Nevertheless, the court notes the following:

First, the relevant period is from August 31, 1985 until six months after November 15, 1993, see 10 U.S.C. § 631(a)(1), not until November 15, 1993 only. Second, the court is of the opinion that the purpose of such calculations is self-evident, to establish a minimum damages award, and that only the amount, and not the propriety of such award "depends" upon the decision of the AFBCMR or Secretary on remand. In the event the Board vacates the 1993 SSBs' passovers, the amount would be increased to include plaintiff's damages from the time of the separation pursuant to 10 U.S.C. § 631(a)(1) as the result of the two 1993 passovers, up until plaintiff is properly separated from the service. If the court and AFBCMR do not vacate the 1993 SSBs' decisions, the amount resulting from these calculations, less plaintiff's earnings during that period, and any other adjustments required by law, will establish the full amount of the final judgment in plaintiff's favor.

S/
DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

In the United States Court of Federal Claims

No. 91-1008C

(Filed May 11, 1995)

GREGORY C. PORTER,

Plaintiff,

v.

THE UNITED STATES

Defendant.

Order

A status conference shall be held at the United States Court of Federal Claims, 717 Madison Place, N.W., Washington, D.C. on Monday, July 10, 1995 at 2:00 P.M. to discuss the issues described below. Agency counsel shall attend.

1. The 1985 and 1993 AFBCMRs both concluded that "[s]ufficient relevant evidence ha[d] been presented to demonstrate the existence of probable error or injustice" in regard to plaintiff's claim, and that special selection boards (SSBs) should be convened. App. 20-21, 79 (emphasis added). [1] Nevertheless, the court doubts the board's authority to convene an SSB merely to make the materiality decision statutorily assigned to the board and the Secretary.

---

[1] "App." refers to the appendix to defendant's February 21, 1995 status report.

While a similar procedure, referring a BCMR's materiality determination to another entity, was sanctioned in Yongue v. United States, 9 Cl. Ct. 635, 638 (1986), and Braddock v. United States, 9 Cl. Ct. 463, 473 (1986), the entities receiving the referrals in these cases were standby advisory boards (STABs), which are not statutory promotion boards that may be convened only if they meet statutory prerequisites, but rather boards established for the very purpose of providing such advice. (The court has elsewhere declined to follow Braddock, insofar as it held that a STAB may perform the promotion selection duties of an SSB. See Finkelstein v. United States , 29 Fed. Cl. 611, 627 (1993).) Thus, the referrals to the SSBs for advice in this case appear to be unauthorized, under either the statute governing the correction board, 10 U.S.C. § 1552, or the statute defining the authority of the Secretary to convene an SSB, 10 U.S.C. § 628.

10 U.S.C. § 1552(a)(1) provides, in part, "The Secretary of a military department may correct any military record ... of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. ... [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department." [2] Corrections must be made under procedures established by the Secretary of the service and approved by the Secretary of Defense. 10 U.S.C. § 1552(a)(3). Under 32 C.F.R. § 865.3, "The function of the [AFBCMR] is to consider all applications properly before it to determine the existence of an error or an injustice and, when appropriate, to make recommendations to the Secretary of the Air Force."

---

[2] In certain circumstances not relevant here, the Secretary is not required to act through the board, 10 U.S.C. § 1552(a)(2), in making corrections.

Thus, neither statute nor regulation appears to authorize the AFBCMR to take affirmative action to correct a record on a mere finding of probable error or injustice; nor to delegate its responsibility to make correction decisions to a non-civilian board, such as an SSB; nor, indeed, to take any action other than making a recommendation to correct or not to correct an error or injustice.

The concept of "probable materiality" does not appear in the correction board's authority statute. The regulation uses the term, but only to establish the scope of prima facie review of an application, i.e., the threshold for board consideration of the application, not the standard for granting it. See 32 C.F.R. § 865.9(b) (allowing the board to "deny any application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice") (emphasis added). "Probable materiality" thus appears to provide an insufficient basis for affirmatively authorizing (recommending) a correction, or any other action, under the statutory language of § 1552. Nor do § 1552 or the regulations thereunder authorize referral for, never mind deference to, an SSB's determination of "materiality" upon the board's finding of sufficient evidence of "probable material error."

More importantly, 10 U.S.C. § 628(b)(1), enacted by Pub. L. 96-513, § 105, 94 Stat. 2835, 2859 (1980), which authorizes the use of SSBs for promotion selection decisions, permits them to be convened only upon the Secretary's determination that:

> (A) the action of the [previous selection] board which considered the Officer was contrary to law or involved material error of fact or material administrative error; or

(B) the board did not have before it for its consideration material information. (Emphasis added.)

Thus, § 628 does not, either expressly or by implication, authorize an SSB to be convened to make a promotion, selection decision based merely on a Secretarial determination of "probable" material error, or lack of "probable" material error. Nor does § 628 authorize an SSB to be utilized merely to advise a BCMR (or the Secretary) whether a "probable" error was material under § 628, or whether it is "necessary [for the board] to correct [the] error or to remove an injustice" under § 1552 (or 32 C.F.R. § 865.9(b)). (Given that SSBs must be composed of active duty military personnel, whereas the boards must comprise civilian employees, it would appear to undermine the point of having civilian correction boards if the correction boards routinely delegate their decisions to the uniformed (SSB) boards.)

The SSB, in short, is not an informal secretarial creation like a STAB, see generally Finkelstein v. United States , 29 Fed. Cl. at 625,but rather, see Evensen v. United States, 654 F.2d 68, 74 (Ct. Cl.1981); Braddock v. United States, 9 Cl. Ct. at 467, a statutory entity, the use of which is subject to the conditions and limitations established by Congress. Because it would be beyond the AFBCMR's statutory authority to treat an SSB like a mere STAB, the court must deem the AFBCMR to have performed in accordance with the requirements of the relevant statutes. Thus, the court must conclude (as it has in its prior orders) that the board's referral to the SSB of the issue of whether the record of plaintiff's passovers by the prior selection boards should be corrected because the errors before those boards were material was, in effect, a decision to correct the record of his nonselection by those boards. Had the AFBCMR merely determined that the errors in Mr. Porter's record before the board needed to be

corrected (or not), the SSB referral was unnecessary. Once the board convened the SSB, however, the errors must be deemed material to the nonselection decisions and to require correction of the records to remove the nonselections. See G. L. Christian & Assocs. v. United States, 312 F.2d 418, 424-427 (Ct. Cl.1963) (court may deem to have been done that which should have been done).

2. The court is not persuaded by the AFBCMR's rejoinder, App. 7-14, disputing the court's conclusion that the 1985 and 1993 AFBCMR decisions, which referred plaintiff's case to SSBs without stating whether plaintiff's prior passovers were voided, constructively (pursuant to the board's duty to recommend the correction of erroneous records) corrected plaintiff's records to void the previous passovers. Porter v. United States, No. 91- 1008, slip op. at 8-9 (Fed. Cl. Oct. 31, 1994), as clarified, Porter v. United States, No. 91-1008C, slip op. at 4 (Fed. Cl. Dec. 30, 1994).

Correcting a record to delete a passover does not necessarily, as the AFBCMR implies, require actual reinstatement to active duty. Indeed, such a correction of a record frequently is ordered as an incident to the award of money damages, such as the back pay and benefits claimed by plaintiff here. This is evident from this court's own statutory grant of jurisdiction, the Tucker Act, 28 U.S.C. § 1491(a)(2), as amended, which permits this court to grant full relief in employee pay cases such as this:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such order may be issued to any appropriate official of the United States.

Moreover, the basis upon which this court historically has grounded its authority to award relief in government employee discharge cases incompatible with the AFBCMR's position that back pay is not permitted for wrongful discharge due to wrongful passovers. The court's authority in these cases is based on the rationale that the statute setting an employee's rate of pay is a money-mandating statute under the Tucker Act, and entitles the employee to continue receiving that rate of pay unless and until the employee is properly discharged. E.g. United States v. Wickersham, 201 U.S. 390, 397-99 (1906). Since plaintiffs discharge was predicated solely on the two-passover rule at 10 U.S.C. § 631, if even one of the two passovers is improper due to material error, as we must deem the AFBCMR to have determined in this case, there. are insufficient grounds for discharge under § 631. Therefore, plaintiff is entitled to continue receiving pay at the rate applicable to his last position until he is properly passed over, regardless of whether or not he actually continues to serve on active duty or is officially reinstated to active duty, in fact or as a matter of record correction. In short, the cases clearly assume that an illegal or improper discharge is a nullity, of no effect regardless of whether the Secretary (or correction board) subsequently expressly and specifically recognizes this. E.g., United States v. Testan, 424 U.S. 392, 402 (1976); Rice v. United States, 31 Fed. Cl. 156, 162 (1994). Also it is irrelevant, under Wickersham, for back pay purposes, whether plaintiff would or could have been properly discharged at the time, if he in fact was not. See Wickersham, 201 U.S. at 399 ("whether he could have been [properly discharged at the time] is not the question now before the court, but the question is whether the employe[e], during his wrongful [discharge] ... is entitled to the compensation provided by law").

This conclusion is further supported by the recently-enacted Reserve Officer Personnel Management Act, 10 U.S.C. §§ 14001-97. Section 14502, unlike § 628, expressly authorizes SSBs to consider former officers for promotion. The absence of such language from § 628 indicates that SSBs currently may only consider present officers. Therefore, the AFBCMR's referral of plaintiff to the SSB for promotion consideration must be predicated on his continued status as an officer, until properly nonpromoted twice, for such purposes.

3. The 1986 SSBs convened to sit for the CY 84B and CY 85A selection boards were composed of the same officers. App. 64. Similarly, the two SSBs convened in 1993 for those years were both composed of the same officers. App. 140. It appears to the court that this was improper, and that the decisions of both SSBs sitting for the CY 85A selection board were therefore void, for a passover by an illegally constituted board is invalid, Doyle v. United States, 599 F.2d 984, 993-98 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980).

Under 10 U.S.C. § 628(a), SSBs must be composed in accordance with 10 U.S.C. § 612, which in turn provides, "No officer may be a member of two successive selection boards convened under § 611 (a) of this title for the consideration of officers of the same competitive category and grade." 10 U.S.C. § 612(b). Sections 612 and 628 were enacted as part of the same statute, and § 612(b) did not at that time include the phrase "convened under section 611(a) of this title." See Defense Officer Personnel Act of 1980, Pub. L. 96-513, § 105, 94 Stat. 2835, 2851, 2859. The phrase was added the next year. See Defense Officer Personnel Management Act Technical Corrections Act, Pub. L. 97-22, § 4(a)(4), 95 Stat. 124, 126 (1981).

The court is inclined to conclude that § 628 incorporated all of § 612, including § 612(b). This accords with the clear purpose of §612(b)---to ensure that no individual officer participates on successive boards considering a candidate's promotion, and thus to "give officers not selected by a promotion board a fresh consideration by different board members." H.R. Rep. No. 1462, 96th Cong., 2d Sess. 67 (1980); cf. Horn v. United States, 671 F.2d 1328, 1331 (Ct. Cl. 1982) (decision of standby advisory board that contained members of previous standby advisory board and original selection board was void). A congressional intention to incorporate only part of § 612 into § 628 could easily have been reflected by a narrower reference to § 612 in § 628.

This conclusion is consistent with the purposes for the 1981 amendment to § 612(b) set out in the legislative history, which shows that the change was intended only to exempt continuation boards convened under § 611(b), as distinguished from promotion selection boards convened under § 611(a), from the prohibition on participation on successive boards considering the same competitive category and grade. H.R. Rep. No. 141, 97th Cong., 1st Sess. 3, reprinted in 1981 U.S.C.C.A.N. 24, 26 ("The provision of DOPMA that restricts officers from serving as members on successive selection boards for the same grade and competitive category would be amended to apply only to promotion boards. This would permit the use of the same board members on active duty continuation boards convened as an adjunct to the promotion consideration process."); see also id. at 12, reprinted in 1981 U.S.C.C.A.N. at 35.

Since SSBs are promotion boards, not continuation boards, it would appear that the 1981 amendment did not extinguish the applicability of § 612(b) to SSBs. (Moreover, § 628's specific reference to § 612 does not include subsequent amendments to § 612. See Longmire v. Sea Drilling Corp, 610 F.2d 1342, 1352 (5th Cir. 1980) (a statute incorporating

a limited and particular provision (specific reference) reference does not incorporate a subsequent amendment to that provision unless there is legislative intent authorizing this incorporation) (citing e.g., Director v. Peabody Coal Co., 554 F.2d 310, 322 (7th Cir. 1977)); Pearce v. Director, Office of Workers' Compensation Programs, 603 F.2d 763, 767 (9th Cir. 1979). See generally 2B Norman J. Singer, Sutherland on Statutory Construction §§ 51.07-.08 (5th ed. 1991 & Supp. 1995).)

S/_____
DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: 88-02149

Gregory C. Porter COUNSEL: None

0008-40-2518 HEARING DESIRED: No

RESUME OF CASE

On 22 August 1985 the Board considered applicant's request to void an officer Effectiveness Report (OER), for the period closing 2 January 1984 and provide him reconsideration for promotion to the grade of captain for the calendar year (CY) 1984B selection board. The Board believed that the interests of justice would best be served by removing the contested report from the applicant's record and by placing his corrected record before a Special Selection Board (SSB) for reconsideration. Applicant's requests were granted and on 3 October 1985, it was directed that applicant's corrected record be placed before an SSB for reconsideration to the grade of captain by the CY84B and CY85A Captain Boards. The SSB, for the CY84B and CY85A Captains Boards, was convened on 24 March 1986 and applicant was nonselected by those boards. (Exhibit A).

On 10 February 1989, in a second application, the Board considered applicant's requests that: 1) He be reinstated in the Air Force in the grade of captain with date of rank of 5 March 1985; 2) his OER for the period closing 2 July 1983 be changed to reflect that he was the "Chief, Personnel Utilization", rather than the "Wing/Base Chief, Customer Assistance Section"; 3) the entry "Special Asst to Chief

CBPO" be removed from his duty history; 4) the Letter of Evaluation (LOE) attached to the OER closing 16 November 1984 be removed; and 5) upon reinstatement, the OER written in May 1985 be removed from his record.

With regard to the incorrect duty titles, the Board found that the evidence relating to applicant's allegations of incorrect duty titles did not overcome the advice of the Air Staff indicating compliance with regulatory provisions. Consequently, the Board found no basis to recommend relief.

The Board also found that the applicant had not provided convincing evidence or arguments to show that his corrected record was inaccurate or improperly evaluated by the SSB and therefore, had no reason to either set aside the decisions of the boards, promote him, or restore him to active duty.

Applicant also requested a comparison of his record to the composite record of another lieutenant who had been selected for promotion and a determination that he should also be promoted. However, the Board pointed out that their statutory authority does not permit them to arbitrarily usurp the prerogative or of other statutory boards. Since the Board did not find that the selection boards acted improperly or on erroneous information, it found no basis to recommend that their (selection boards') decisions be set aside. Accordingly, the Board denied applicant's application on 24 April 1989. (Exhibit B).

On 12 May 1990, applicant submitted a request for reconsideration for promotion to the grade of captain and reinstatement. After his request was examined, the Board found that it did not meet the criterion for reconsideration and determined that favorable action on his request was not possible. (Exhibit C)

On 12 March 1991, applicant filed a complaint in the United States Court of Federal Claims and on 30 December 1992 the court issued an order remanding this case to the AFBCMR for further proceedings. The court determined that, in this case, there seems to have been cogent and convincing evidence before the AFBCMR that the records presented to the SSB were incorrect as to applicant's duty record and that inclusion of the Letter of Evaluation (LOE) was an error or injustice comparable to the inclusion of the OER that was voided by the Secretary upon recommendation of the 1985 AFBCMR. The court observed that at the summary judgment stage and without the benefit of knowing the grounds therefore, it could not conclude that the AFBCMR's determinations that there was no error as to applicant's duty history or LOE, or that these error were insignificant or provided no causal nexus to his nonselection, in that that they did not make applicant's record appear worse, were supported by substantial evidence and not arbitrary or capricious. On this record, the court indicated that it could not, however, uphold a determination (not made by the AFBCMR) that, even if these were errors or injustices were present, they would not have affected the original selection boards' nonselection decisions. If, on remand, the AFBCMR determines that there were one or more significant errors in the records before the SSB, it should make whatever recommendations to the Secretary it deems appropriate, including reinstatement, back pay, correction of records (including, but not limited to voiding the SSB decision), and another opportunity to be considered by an SSB sitting for the CY84B and CY85A selection boards. (Exhibit D)

THE BOARD CONCLUDES THAT:

1. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice in

regard to the accuracy of the contested LOE and the applicant's duty titles. In this respect, we note that:

a. The comments on the contested LOE are similar to the comments on the contested OER closing 2 January 1984 which the Board found to be in error. We believe that the since the OER was removed, the LOE should also be voided.

b. The issue concerning applicant's duty titles during the period 13 June 1983 through 11 October 1983 is very unusual. Based on the documentation provided, it appears that applicant was assigned to the position "Chief, Personnel Utilization Section" during the period in question. He was not relieved of his duties in this position until 11 October 1983. For whatever reason, this change in duty titles was backdated to 3 July 1983. Whether of not this action was taken to help the applicant as indicated by the Air Staff cannot be determined. Regardless, the action taken was inappropriate, if not illegal. Based on the above, we believe that the duty title "Chief, Personnel Utilization Section" should be added to his officer selection brief and to the OER closing 2 July 1983. In addition, the duty title "Special Asst to Chief CBPO," which shows an effective date of 4 July 1983, should be removed from his OSB.

c. Since the recommended corrections will materially change the applicant's record, he should be considered for promotion to the grade of captain by Special Selection Board for the Calendar years 1984B and 1985A selection boards.

2. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice in regard to applicant's request for promotion to the grade of captain through the correction of records process. In this regard, we note the following:

a. Special Selection Board (SSB) procedures were established by law, to consider officers for promotion when (1) an officer should have been considered by a central board but due to an administrative error was not considered and (2) a legal error or material error exists in an officer's record when considered by the central board. The SSBs replicate central selection boards to the maximum extent possible. The SSB considers the record of the officer as it would have appeared to the original board had the officer been properly considered and the record will be compared with benchmark records from the original board.

b. It cannot be conclusively determined whether or not applicant would have been selected for promotion by the selection boards in question. We believe a duly constituted SSB applying the appropriate promotion criteria is in the most advantageous position to render this determination. We believe applicant's record, to include the above recommended corrections, can receive a fair and equitable consideration for promotion by the SSB process. Therefore, we do not recommend favorable action on his request for promotion.

c. If the applicant is nonselected by the SSB, no further action will be required on his application. However, if he is selected for promotion, the applicant will be provided the opportunity to request reinstatement in the Air Force and his request will be considered by this Board.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. The Supplemental Evaluation Sheet, AF Form 77, for the period 3 January 1984 through 11 March 1984, be declared void and removed from his records.

b. Item II. Job Description, 1. Duty Title, on the Officer Effectiveness Report, AF Form 707, rendered for the period 3 January 1983 through 2 July 1983, be corrected to reflect: "Chief, Personnel Utilization Section."

c. The Duty Title, "Chief, Personnel Utilization Section", with effective date "13 June 1983", be added to his Officer Selection Brief (OSB).

d. The Duty Title, "Special Assistant To Chief CBPO", effective 4 July 1983, on the Office Section Brief (OSB), be deleted.

It is further recommended that he be considered for promotion to the grade of captain by Special Selection Board for the Calendar years 1984B and 1985A Central Captains Board.

The following members of the Board considered this Application in Executive Session on 1 July 1993, under the provision of AFR 31-3:

Mr. Charles E. Bennett, Panel Chairman
Mr. Martin H. Rogers, Member
Mr. Curtis Bowling, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A.	ROP, dated 25 Sep 85, with atchs.
Exhibit B.	ROP, dated 24 Apr. 89, with atchs.
Exhibit C.	AFBCMR letter, dated 30 Aug. 90, with atchs.
Exhibit D.	U.S. Court of Federal Claims Remand Order, No. 91-1008C, dated 30 Dec 92

/s/
CHARLES E. BENNETT
Panel Chairman

SECOND ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION
OF MILITARY RECORDS

IN THE MATTER OF: DOCKET NUMBER: 88-02149

GREGORY C. PORTER COUNSEL: None

008-40-2518 HEARING DESIRED: No

RESUME OF CASE:

On 22 August 1985, the Board considered applicant's request to void the officer Effectiveness Report, closing 2 January 1984 and provide him reconsideration for promotion to the grade of captain for the Calendar Year 1984B (CY84B) selection board. The Board believed the interests of justice would best be served by removing the contested report from the applicant's record and by placing his corrected record before a Special Selection Board (SSB) for reconsideration. Applicant's requests were granted and on 3 October 1985, it was directed that his corrected record be placed before a Special Selection Board (SSB) for promotion reconsideration to the grade of captain by the CY84B and CY85A captain boards. The SSBs for the CY84B and CY85A captain boards, were convened on 24 March 1986 and he was nonselected for promotion. A complete copy of the Record of Proceedings is attached at Exhibit A.

On 10 February 1989, in a second application, the Board considered his requests that: 1) He be reinstated in the Air Force in the grade of captain with date of rank of 5 March 1985; 2) his OER closing 2 July 1983 be changed to reflect that he was the "Chief, Personnel Utilization," rather than the "Wing/Base Chief, Customer Assistance Section"; 3) the entry "Special Assistant to Chief CBPO" be removed from

his duty history; 4) the Letter of Evaluation (LOE) attached to the OER closing 16 November 1984 be removed, and 5) upon reinstatement, the OER written in May 1985 be removed from his record. With regard to the incorrect duty titles, the Board found that the evidence relating to applicant's allegations did not overcome the advice of the Air Staff indicating compliance with regulatory provisions. Consequently, the Board found no basis to recommend relief. The Board also found that the applicant had not provided convincing evidence or arguments to show that his corrected record was inaccurate or improperly evaluated by the SSB and therefore, had no reason to either set aside the decisions of the boards, promote him, or return him to active duty. He also requested a comparison of his record to the composite record of another lieutenant who had been selected for promotion and a determination that he should also be promoted. However, the Board pointed out that their statutory authority does not permit them to arbitrarily usurp the prerogative of other statutory boards. Since the Board did not find that the selection boards acted improperly or on erroneous information, it found no basis to recommend that the decision of the selection boards be set aside. Accordingly, the Board denied his application on 24 April 1989. A complete copy of the Record of Proceedings is attached at Exhibit B.

On 12 March 1991, he filed a complaint in the United States Court of Federal Claims and on 30 December 1992 the court issued an order remanding the case to the Board for further proceedings.

The Board considered the application on 1 July 1993 and found sufficient evidence of error or injustice to warrant voiding the LOE closing 11 March 1984, correcting his duty history, and providing him SSB consideration for promotion to the grade of captain for the CY84B and CY85A selection boards. However, the Board found insufficient evidence to

warrant his direct promotion to the grade of captain. (Exhibit C)

On 15 November 1993, he was considered and not selected for promotion by SSBs for the CY84B and CY85A selection boards.

On 31 October 1994, the Federal Claims Court again remanded the case to the Board with direction that the applicant's record be corrected to show reinstatement at his discharge rank and date and that he be paid the wages and other benefits to which he would have been entitled if he had served at the reinstated rank of first lieutenant for a least the period between his original unlawful discharge pursuant to 10 USC 631 on 31 August 1985 ... and 15 November 1993 when he was nonselected for promotion by the SSBs for the CY 84B and CY 85A boards. The court also ordered the Secretary (or AFBCMR) to review the full records before the 1993 SSBs to ensure that the standards of 10 USC 628 and AFR 36-89 were met and specifically decide whether these SSBs' nonselections were arbitrary and capricious, unsupported by substantial evidence, or legally erroneous. A complete copy of the court order is attached at Exhibit D.

The applicant seeks the following relief:

1. He be reinstated in accordance with the court's order, with all pay and allowances.

2. He be promoted to the grade of captain as if selected by the CY84B Central Captain Selection Board.

3. His nonselections by the CY84B and CY85A selection boards be declared void.

4. He be retired at the earliest practical date.

AIR STAFF EVALUATION:

The Chief, Appeals and SSB Branch, AFMPC/DPMAJA, reviewed the application and states that the SSBs for the CY84B and CY85A captain boards convened on 15 November 1993 and each SSB considered and scored the applicant's record. They note that he was the sole officer eligible for promotion by the SSBs, and two different sets of ten benchmark records were scored along with the applicant's record. For each SSB, five of the benchmark records were selectees on the original promotion board and five were non selects on the original promotion board. In regard to the procedural aspect of scoring the benchmark records, they note that the governing regulation states that a member will be selected if his or her record scores higher than all the nonselect records and ties at least one of the selected records from the original board. Furthermore, after the scoring is completed, the board president is advised by the Selection Board Secretariat as to which members were selected for promotion by the original promotion boards and which were not, as well as the identity of the consideree(s). The SSB scoring is then reviewed by the board president to determine whether the officer would have been selected if his records had been properly considered by the prior board, unfettered by material error. The board president cannot alter the scores assigned by the SSB. If the consideree's score did not meet this criteria for selection, the board president signs the board report indicating that the consideree was not recommended for promotion. In addition, the board members all sign the board report to indicate their participation in the proceedings.

A complete copy of the Air Staff evaluation is attached at Exhibit E.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

The applicant reviewed the Air Staff evaluation and states the Air Force acted arbitrary and capricious during the SSBs based on the following:

1. His record scored higher than one officer selected for promotion by the CY84B board. He has been provided copies of the benchmark records of the SSBs convened for the CY84B and CY85A Central Captain Selection Boards. He states that he has scored the records using AFP 36-32, You and Your Promotions - The Air Force Officer Promotion System. In addition, he has obtained the record of Lieutenant (now Captain) W--- who was selected for promotion by the CY84B board. He states that based on his and Lt W---'s composites for the SSB convened for the CY84B board, he scored higher than one selected officer and should have been promoted. In this respect, he notes that his composite states that his, "overall promotion support fluctuates, which is not desirable." However, the composite of Lt W---, who was selected for promotion, clearly shows more fluctuation than his [the applicant's]. He believes the gap left by the OER, closing 4 January 1984 which was voided by the Board, left a gap which was a contributing factor in his nonselections. He feels this is substantiated by the comments of the Chief, Selection Board Secretariat in his letter, dated 2 May 1991, in which he states, "It's possible that some part of the duty history was explained by an OER or OPR that was subsequently removed from the record."

2. The Board Secretariat indicated that during the SSB process his corrected record would be compared with a sampling of records of individuals who were and were not selected for promotion by the original boards; however, the Air Force Legal Services Agency (AFLSA) has indicated that all records would be rescored and then compared.

3. The board report for the CY84B SSB indicates that the board convened at 1518 hours, 15 November 1993 and adjourned at 1545 hours. The board report for CY85A SSB indicated that the board convened at 1545, 15 November 1993 and adjourned at 1620, 15 November 1993. Being conservative it would take the SSB at least one and half hours to hold one board. First, the board is convened (13 minutes), then sworn in (5 minutes), read the instruction verbatim (10 minutes), a sample scoring is completed (15 minutes), score each officer's record (33 minutes based on 3 minutes per record -applicant and 10 benchmark records), compile all board member's scores (15 minutes), finalize results and adjourn board minutes (10 minutes). Furthermore, the Chief, Special Selection Board Unit has stated that the same records were used in the 1986 and 1993 SSBs, with one exception, that the 1986 SSB, had only nine records. He finds it unusual that one record which was missing for seven years, was available for the 1993 SSB. Official records and statements clearly show a violation of promotion board procedures.

4. He was not provided fair and equitable consideration for promotion because the promotion board quotas were misapplied during the SSB process. The governing Air Force pamphlet states that, "Each panel receives a proportionate share of the board quota based on the number of records it scored. The quota is then applied going from the top of the relative order of merit listing down until the quota is exhausted." This violates his right to fair consideration since a panel does not make up a board. The CY84B SSB was comprised of five panels each considering 669 officers; however, the original CY84B board considered 3345 officers. In addition, the CY85A SSB was organized into six panels, each considering 568 officers, whereas the original CY85A board considered 3427 officers. Therefore, during the SSBs he was only considered with 1/5th of his peers for the CY84B board and 1/6th of his peers for the CY85A

board, rather than all of his peers as in the case of the original boards. If the CY84B and CY85A SSBs had five and six panels respectively, it also had to have five and six "gray zones". If the SSBs had scored all records, aligned them on one list, then applied the promotion quota, he would have received a fair and equitable opportunity for promotion.

Applicant's complete response, with attachments, is attached at Exhibit G.

THE BOARD CONCLUDES THAT:

Pursuant to the Remand Order of the U. S. Court of Federal Claims of October 31, 1994, and the Clarification Order of December 30, 1994, we have reviewed the complete records that were before the 1993 SSBs to ensure the standards of 10 USC 628 and AFR 36-89 were met and to decide whether these nonselections of the applicant were arbitrary and capricious, unsupported by substantial evidence, or legally erroneous. Having carefully reviewed 10 USC 628, the legislative history of this section of law and the applicable section of AFR 36-89, we have determined that the 1993 SSBs that assessed the applicant's corrected records against certain records of his peers who were considered for promotion to the grade of captain by the original selection boards were in compliance with all applicable standards. In this respect, we observe that:

a. Title 10, United States Code, Section 628, requires an SSB to consider the record of the officer as his record would have appeared before the board that considered him. This provision of law also requires that the record be compared with a sampling of the records of those officers of the same competitive category who were recommended for promotion and those officers who were not recommended for promotion by the original board. The legislative history states that subsection 628(b) would authorize such boards to consider

an officer not selected by a board where it has been determined, under directives prescribed by the Secretary concerned, that the action of the board involved a substantial injustice, error of law, material error of fact, or material administrative error. The legislative history goes on to state that the purpose of this subsection is to provide a means to make a reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error. Neither 10 USC 628 nor the legislative history contains a requirement that an officer be on active duty at the time of SSBs consideration to be eligible for consideration for promotion by an SSB. In fact, 10 USC, Section 619, appears in a separate subchapter of Chapter 36 and is not specifically incorporated into 10 USC, Section 628. In our view, the statutory scheme of Chapter 36 of Title 10, taken in its entirety, provides the requisite authority to extend to separated members the SSB provisions of Section 628.

b. We believe the most reasonable interpretation to be given Section 628 in the context of the entire Chapter 36 is to interpret the term "officer" in the law as applying to the status of the individual at the time of the original promotion consideration when the error or injustice occurred. In other words, the status of the individual at the time of the SSB does not govern, but rather, the status at the time of the error which led to the improper consideration at the original promotion board -- when, of necessity, the individual would have been on active duty. The purpose of Section 628 is to provide a mechanism to compare the officer's record with a sampling of other active duty list officers, records in a process which, by its very design, is intended to recreate history. When that premise is combined with the realization that the very same subchapter of Chapter 36 that contains Section 628 also provides that officers twice nonselected must be separated within 6 months, it would be unreasonable

in the context of such a scheme to exclude from consideration under Section 628 the very officers who are most likely going to need to utilize that SSB procedure to resolve the alleged errors that may have ultimately led to their separation. Indeed, often officers (like Mr. Porter, for example) do not attempt to correct their records until they have failed to be promoted at least once.

c. Even if Section 628 was ultimately held not to authorize SSBs for separated officers, we believe such authority clearly exists under the Secretary's authority to conduct the affairs of the Air Force. 10 USC, 8013b. In this regard, see ***Dowds v. Bush, 793 F.Supp. 1289, 1296 (D.D.C. 1992), footnote 5.*** Moreover, nothing in the law or regulation prohibits the Secretary in exercising that authority from adopting for separated officers the exact same procedures prescribed in Chapter 36 and Section 628. Indeed, such procedures are entirely appropriate, as they represent the statutorily sanctioned scheme for promotion promulgated by Congress. ***Finkelstein v. United States, 29 Feb. Cl. 611, 625-627 (1993).***

d. The directive prescribed by the Secretary that was in effect at all times pertinent to this case, (AFR 36-89), sets forth the SSB procedures in detail and includes the requirement to, among other things, score records for boards or competitive categories with less than a 100 percent selection quota. This ***regulation also authorized the consideration of officers who were not on active duty who had petitioned the AFBCMR or a court to be restored to active duty.*** It further indicates that an officer considered by an SSB, but not recommended for promotion, would incur no additional failure of selection for promotion unless the failure of selection by one or more original boards had been set aside (voided) by proper authority when the case was referred to the SSB. In these cases, officers would be considered to have failed selection for promotion. It is clear

from this provision that AFR 36-89 does not contemplate that the prior failure of selection would be voided in every case, or that there is any requirement to do so.

e. We have reviewed the Memorandum of Instructions for the 15 November 1993 SSB and the Board Reports of both SSBs, signed by each member, indicating, among other things, that they carefully considered the records of each officer whose name was furnished to them. We have also reviewed an affidavit from the board chief and an advisory opinion from the Air Staff indicating that two different sets of ten benchmark records were scored along with the applicant's records. Since board scores are routinely destroyed after the board adjourns, no more direct evidence about this issue exists. We accordingly conclude that the SSB members complied with the law and their instructions, and scored all of the records they were required to score. Other than speculation based on the terminology utilized in board related correspondence and the time that the boards were in session, the applicant has offered no evidence to indicate that the SSB members did not properly perform their duties.

Accordingly, we find that the 1993 SSBs that assessed the applicant's corrected records were conducted in accordance with 10 USC 628 and AFR 36-89.

2. As required by the Court's Order, we have performed a review and analysis of all of the benchmark records and the applicant's records that were before the 1993 SSBs. With all due respect to the Court, we do not believe that this Board is the proper forum to perform such a function. Congress has made it clear that the comparison of officers' records to determine who among them is best qualified for promotion is properly a function of selection boards convened under Chapter 36 of Title 10. Our review and analysis has not persuaded us that the applicant's nonselections for promotion

to the grade of captain were arbitrary and capricious, unsupported by substantial evidence, or legally erroneous. We recognize that we have no way of determining what significance the SSBs attached to any one factor in assessing the records under the whole person concept. In the applicant's case, however, we note a significant difference in quality between his record and those of the selectees.

a. As an example, the applicant's last 5 OERs, after the AF Form 77 on top, all had markdowns on the front side under Performance Factors. One of the five reports was a decontrolled "2" from the wing commander indicating that applicant was "learning how to handle details, supervise people, and overcome frictions in such relationships." The two most recent reports, in addition to three markdowns under Performance Factors, alluded to his failure to maintain Air Force weight standards. In other words, the applicant's records appeared before the CY84B SSB with his top two reports indicating less than optimum performance in Professional Qualities. On the other hand, the benchmark records of the CY84B lowest scoring selectees had substantially fewer downgrades on the front side rating factors and no comments in any of their records that we could characterize as less than favorable. In fact, after reviewing all of the records, we found only one record that appeared to be of lesser quality than the applicant's record. This officer, however, like the applicant, was also a nonselectee by the original CY84B selection board.

b. Applicant's records before the CY85A SSB had been improved somewhat by the addition of a 1-1-1 OER, containing the highest possible ratings for the first time without any markdowns on the front side rating factors. However, with the exception of one benchmark record that had three markdowns on the front side of the first report, the records of the selectees had the highest possible ratings in Evaluation of Potential and Performance Factors. The

selectee that had three markdowns on the front side of his first report also had the highest possible ratings in Evaluation of Potential and Performance Factors on his last three OERs at the time he competed for promotion to captain by the original CY85A selection board.

Based on our review of the applicant's records in comparison with the benchmark records of officers who were and were not selected by the original selection boards, we find no basis to conclude that his nonselections by the 1993 SSBs were arbitrary and capricious, unsupported by substantial evidence, or legally erroneous. To the contrary, our review of the applicant's record in comparison with the benchmark records of the highest scoring nonselectees and the lowest scoring selectees, has made us even more confident that the applicant's record, reflecting that he was fully qualified, was not sufficiently competitive to ensure his advancement given the overall quality of the competition and the less than 100% promotion opportunity in the original selection boards.

3. Having complied with the Remand Order of the Court, we believe there are some observations or assumptions made by the Court that would benefit from further discussion notwithstanding the absence of a mandate to do so. Specifically, we feel constrained to address the assumptions that the applicant's records have been corrected to show reinstatement on active duty at the rank of first lieutenant as of August 31, 1985, up until at least six months after his second nonselection by the 1993 SSB, and that there was a high probability that there was a substantial difference between the benchmark records used by the SSBs and the gray zone for the original CY84B and CY85A panels.

a. On September 26, 1984, the applicant applied to the AFBCMR, requesting the contested report closing January 2, 1984, be voided and that he be reconsidered for the CY84B Captain Selection Board under supplemental consideration.

He had then been once considered but not selected for promotion to the grade of captain. While that request was pending, he was again nonselected for captain. As this was his second nonselection, he then had a mandatory date of separation (DOS) of August 31, 1985.
After reviewing the documentation submitted, the original panel of the AFBCMR, on August 22, 1985, concluded that the interest of justice would best be served by removing the contested report and placing applicant's corrected record before an SSB for reconsideration as he had requested. Mr. Porter did not request that any passover be voided, or that his separation be deferred (as he could have done by amending his application after his second nonselection). Had we intended that the applicant remain on active duty until he received reconsideration for promotion by SSBs, we would have recommended removal of one of his nonselections for promotion as we have done on some prior occasions when we believed that our action significantly improved an officer's chance of being selected for promotion on an accurate record.

b. In the instant case, the Court has cited several cases (most notably, ***Doyle v. United States, 599 F.2d 984 (Ct Cl. 1979)*** and ***Evenson v. United States, 654 F.2d 68 (Ct Cl. 1981)*** for the proposition that a determination by the BCMR that a former officer's record contains an error necessitating reconsideration for promotion by SSB also constitutes (or is tantamount to) voiding the original promotion nonselection, and, if the basis for, the officer's separation was his having been twice nonselected, entitling him to reinstatement and back pay. We respectfully disagree. The cases relied upon by the Court all considered errors which occurred prior to the 1980 enactment of the Defense Officer Personnel Management Act (DOPMA). In our view, DOPMA has mooted those decisions and rendered them inapplicable to a case like the one before us. Section 628 of Title 10, enacted as part of DOPMA, created the Special Selection Board

(SSB) as the exclusive procedure for determining whether an officer -- whose original board acted contrary to law or whose action involved a material error of fact or administrative error or where the original board did not have before it for consideration material information -- should be recommended for promotion. Unlike the forms of supplemental consideration available pre-DOPMA, SSBs are not advisory boards, they are selection boards whose recommendations have the same legal effect as selection boards convened under 10 USC 611. An officer selected by an SSB is in every legal sense selected for promotion and the Secretary cannot "overturn" that selection as she can a recommendation of the AFBCMR. Section 628 provides that (1) an SSB shall compare the corrected record with the records of a sampling of those officers of the same competitive category as they would have appeared to the original board and (2) if an officer is not recommended for promotion by the SSB, the officer incurs no additional failure of selection for promotion. This latter provision would be entirely incongruous if the original nonselection had already been voided or expunged. Consequently, we disagree that our decision to grant an SSB necessarily includes or implies the voiding of the original nonselection. That was not our intent and, in our opinion, it is not what the law requires. Our decision that the officer's record contained an error does not mean that the selection board's decision not to promote him also was erroneous. If the officer would not have been promoted even on a corrected record, then his separation also was not erroneous. The promotion decision is for the SSB, not us to make. Therefore, the officer should not be reinstated pending the outcome of the SSB. Should he or she be selected for promotion by the SSB -- which selection by law provides that the officer will have the same date of rank, effective date for pay and allowances, and the same position on the active duty list as if he had been recommended by the original board -- provision can then be made for reinstatement and back pay by us if it is deemed

appropriate. Congress did not provide for a change in status unless the officer was recommended for promotion by the SSB. Finally, given the very real possibility of nonselection, we believe the requirement to return a separated member to active duty solely to meet an SSB is unreasonably burdensome, contrary to the effective management of the officer corps, and not a prudent use of government funds. We would reach the same result even if it were concluded that Section 628 does not apply to separated officers, and that their SSB consideration is based upon the Secretary's authority under 10 USC 8013 - see paragraph 1.c., above.

c. It is not the purpose of SSBs to determine if a "nexus" exists between the errors identified in the officer's record and the promotion nonselections. Rather, the SSB considers the corrected record in comparison to benchmark records and makes the selection decision based on the entire record. By way of background, pre-DOPMA case law held that in the promotion arena, our determination that an error(s) exists in the record constituted only half of the required analysis. We were required also to determine whether the error was causally linked with the harm complained of (the "nexus") -- in other words, was it prejudicial or harmless? ***Engles v. United States,*** 678 F.2d 173, 175 (1982), and cases cited therein. Prior to DOPMA, that decision involved our determination of whether a nexus existed between the material error and the promotion nonselection. Because of the statutorily prescribed remedy provided in 10 USC 628, however, that analysis no longer applies; i.e., it is no longer necessary that we attempt to determine the ultimate effect of an error on nonselection. Our task in post-DOPMA promotion cases is to determine if the error may have denied the applicant proper promotion consideration (which is what we concluded in this case, and all that we will ever likely conclude in such situations) and recommended consideration by SSB. ***See Dodson v. United States,*** 988 F.2d 1199 (Fed. Cir. 1993). ["The BCMR may potentially "remedy an error

which it has found to have occurred in a selection decision by ordering a new selection board convened to make the decision ***de novo***."] As noted by the Court, the SSB is then charged solely with the responsibility of considering the applicant anew for promotion. The SSB does not help us decide if an error is harmless, as was done in ***Braddock v. U.S.***, 9 Cl.Ct. 463, 467-468 (1986) (accord ***Finkelstein v. U.S., supra***, at 627); rather, the SSB itself makes the "reasonable determination as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error (the stated purpose for Section 628(b) in the sectional analysis portion of the legislative history of DOPMA). H. R. Rep. No. 1402, 96th Cong. 2d Sess. (1980), at p. 74. We did not apply the old nexus analysis in the instant case -- and it should not be applied in light of the new statutory scheme.

d. Our original decision in this case was rendered in good faith based on the law as implemented in AFR 36-89. If that implementation was based on an erroneous interpretation of the law, it would seem that, at a minimum, the case should be remanded back to us for an appropriate remedy. This is especially true in light of the clear distinction between the quality of the applicant's records and the quality of the benchmark records of the selectees and nonselectees from the original selection boards.

e. Concerning the observation by the Court that, given the high probability that there was a substantial difference between the benchmarks used by the SSBs and the gray zone for the original CY84B and CY85A panels, the Air Staff has continuously asserted that the panel concept has safeguards to ensure an equal distribution of the quality spectrum of records to each panel. When more than one panel scores a given competitive category, all the eligible records are aligned in reverse social security number sequence and then distributed in groups of 20 records to each panel, i.e., records

1 through 20 to panel one, 21 through 40 to panel two, 41 through 60 to panel three, etc. As each panel scores its share of records, an order of merit (OOM) is formed. One of the major responsibilities of the board president is to review the orders of merit to ensure consistency of scoring on each panel and consistency of quality among panels. To do this, the board president does extensive quality review of records for each OOM in and around where the selection rate falls. For example, assume the selection rate for a given board is 35 percent. The board president does extensive quality review of records for each OOM in and around where the 35 percent level falls (there is no relationship between the numerical scores given by each panel, i.e., panel one may be a liberal scoring panel and have a score of 41 while panel two may be a conservative scoring panel and have a score of 39, the crucial point is that each panel must be consistent in their scoring over the course of the board). Without fail, the quality of records has proven to be identical at the same percentage level on each OOM. Because the quality of records in each gray zone is identical and the benchmark records are selected from the gray zone, we conclude that there is no significant difference between the benchmark records used by the CY84B and CY85A SSBs and the gray zone for the original selection boards.

4. Finally, we have carefully considered the arguments raised by the applicant in his response to the Air Staff advisory opinion, specifically, his assertions that, based upon his personal assessment of the quality of his record against the benchmark records from the original selection boards, he should have been a selectee for promotion to the grade of captain, that the SSBs acted arbitrarily and capriciously in the assessment of his corrected records in comparison with the benchmark records of the lowest scoring selectees and the highest scoring nonselectees of the CY84B and CY85A Captain Selection Boards, and that the Air Force panel system does not constitute a promotion board. These

assertions amount to restatements of the issues discussed above. We find in them no basis to conclude that the applicant has been a victim of either an error or an injustice, or to recommend favorable action on his request for further corrective action.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 11 January 1995, under the provisions of AFR 31-3:

Mr. Charles E. Bennett, Panel Chairman
Mr. Martin H. Rogers, Member
Mr. Curtis Bowling, Member

The following documentary evidence was considered:

Exhibit A.	Record of Proceedings, dated 25 Sep 85, w/atchs.
Exhibit B.	Record of Proceedings, dated 24 Apr 89, w/atchs.
Exhibit C.	Record of Proceedings, dated 16 Jul 93, w/atchs.
Exhibit D.	Letter AFLSA, dated I Dec 94.
Exhibit E.	Letter: AFMPC/DMAJA, dated 9 Dec 94, w/atch.
Exhibit V.	Letter, AFBCMR, dated 12 Dec 94.
Exhibit G.	Letter, Applicant, dated 28 Dec 94. w/atchs.

Exhibit H. Clarification Order, US Court of Federal Claims, filed 30 Dec 94.

CHARLES E. BENNETT
Panel Chairman

DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

Mr. Mac Burton
Acting Executive Director
Air Force Board for Correction of Military Records
3rd Floor/EE Wing
1535 Command Drive
Andrews AFB, MD 20331-7002

1 December 1994

RE: Porter v. U.S., McFarlane v. U.S., Sanford v. U.S.

Dear Mr. Burton:

Per our telecon, I have enclosed the following documents: (1) Letter from the Department of Justice advising of the Judge's order remanding the case of Porter v. U.S. back to the Board for review of the decisions of the November 1993 SSBs with a copy of the order and the government's clarifying order attached; (2) the Nov 93 SSBs Memorandum of Instructions from the Secretary; (3) one copy of the ten benchmark records from the original CY84B Captain selection board, with one copy of Mr. Porter's record as it appeared to the Nov 1993 SSB; (4) one copy of the ten benchmark records from the original CY85A Captain selection board, with one copy of Mr. Porter's record as it appeared to the Nov 1993 SSB; (5) the November 16, 1994 District Court opinion in the case of McFarlane v. U.S., which remanded that case back to the Board; (6) the opinion from the Court of Federal Claims filed 23 Nov 94, in Sanford v. U.S. dismissing his complaint.

Regarding the benchmark records, they have been redacted to remove all identifying information to protect the privacy of the individuals involved. We have tried to leave in as much substantive information as possible. Obviously, the SSBs reviewed the documents in their original form. In

addition, each benchmark record has a notation at the bottom of the selection brief as to whether or not the individual was selected for promotion by the original board. This information is provided so the AFBCMR, as ordered by the Court, can ascertain whether the SSBs acted arbitrarily or capriciously in not scoring Mr. Porter's record higher than all the nonselected officers, and at least as well as a selected officer, which was required in order for Mr. Porter to have been recommended for promotion by the SSBs. AFR 36-89, dated April 17, 1992, ¶ 35d. As we interpret the order, the Court did not order the Board to "rescore" the records, or substitute its judgment for that of the SSBs.

As we discussed, the Board has also been directed by the Court to review the actions of the SSBs to ensure that they complied procedurally with all statutes and regulations. One procedural issue asserted by Mr. Porter in the Court was that the SSBs did not rescore the benchmark records. While the Court noted that Mr. Porter had failed to produce any evidence to support his contention, it might be appropriate to specifically address this issue.

Please advise if the Board needs any additional documents in order to comply with the Court's order, or any additional time to do so. As you know, we have been ordered to file the Board's decision on remand by January 16, 1994. Should the Board need more time because of the need to send any necessary advisories to Mr. Porter for comment, or any other extenuating circumstances, please notify us as soon as possible so we may seek an enlargement of time. Otherwise, we must the deadline as ordered by the Court.

Regarding the issue of whether the Secretary must now make any corrections to Mr. Porter's 'records as apparently ordered by the Court, we have asked the Court for a clarification. As we interpret the Court's decision, no corrections must be made at this time. The Court has not yet responded to our

request, and I will advise you of the Court's decision as soon as we are notified.

Regarding the McFarlane case, the Court has remanded the case back to the Board to determine when Mrs. McFarlane was first aware of the fact that she was receiving less than full Survivor Benefit Plan benefits. Mrs. McFarlane applied to the Board asking that her husband's 1974 SBP election be voided on the basis that she had not been notified and counseled by the Air Force that her husband was electing less than full SBP benefits. The Board denied her application as untimely.

The Court held that the date Mrs. McFarlane became aware that she was receiving less than full benefits will determine when the Board's three-year statute of limitations began to run, which will determine whether her June 1991 application was timely. In making this determination, the Court held that if direct evidence as to the date of Mrs. McFarlane's knowledge of this fact is lacking, the Board may rely on circumstantial evidence that is, "what reasonable people in her situation would have known." Court opinion p. 11. The Court also opined that no knowledge of her husband's election could be attributed to Mrs. McFarlane based upon the fact that she witnessed his signature on the SBP election form. It is unclear from the record whether this fact was a factor in the Board's denial of relief.

At this point, I do not know whether the Board must take affirmative action, or if it is incumbent upon Mrs. McFarlane to request reconsideration from the Board in light of the Court's decision. I have discussed this issue with Ms. Rachel Ballow, the Assistant U.S. Attorney who handled the case with me, to determine what steps, if any, the Board must take. If you have any questions about the McFarlane opinion, please feel free to contact me.

I have also enclosed the opinion in Sanford v. U.S., for your information, although the case was not decided on the basis of the AFBCMR action, but on Mr. Sanford's failure to state a claim in the Court of Federal Claims.

Please contact me at (703) 696-9141, if you have questions concerning any of these issues or opinions.

CARLA S. WALGENBACH, Maj
Trial Attorney
Air Force Legal Services Agency
General Litigation Division
Military Personnel Branch

6 Attachments

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE MILITARY
PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

MEMORANDUM FOR AFBCMR 19 DEC 1994

FROM: HQ AFMPC/DPMAJA
550 C Street West Ste 08
Randolph AFB TX 78150-4710

SUBJECT: Gregory C. Porter, 008-40-2518, Your memo, 8 Dec 94

Here is the information you requested in order to complete your action as directed by the court.

a. Special Selection Boards (SSBs) for the CY84B and CY85A Line Captain Board convened on 15 Nov 93. Each SSB considered and scored the record of applicant. He was the sole officer eligible for promotion by the SSBs. Two different sets of ten benchmark records were scored along with applicant's record. For each SSB, five of the benchmark records were selectees on the original promotion board and five were nonselects on the original promotion board.

a. The following describes the procedural aspect of scoring the benchmark records, AFR 36-89, Promotion of Active Duty List Officers, 17 Apr 92, directs the Special Selection Board (SSB) members on how to score records (paragraph 14b). Under paragraph 35d, "[t]he applicant will be selected if his or her record scores higher than all the nonselect records and ties at least one of the selected records from the original board." The Secretary has devised this procedures as "a means to make a reasonable determination

as to whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error," which was the purpose of Special Selection Boards according to the legislative history of 10 U.S.C. Section 628(b). Senate Report No. 1462, 96th Cong., 2nd Sess. 74 (1980).

b. Furthermore, after the scoring is completed, the Board President is advised by the Selection Board Secretariat as to which members were selected for promotion by the original promotion boards and which were not, as well as the identity of the consideree(s). The SSB scoring is then reviewed by the Board President to determine whether the consideree's record did or did not score higher than all the nonselects and at least as well as a record of a member selected for promotion by the original board. The Board President cannot alter the scores assigned by the SSB. If the consideree's score did not meet this criteria for selection, the Board president signs the board report indicating that the condideree was not recommended for promotion. In addition, the board members all sign the board report to indicate their participation in the proceedings.

We have enclosed a copy of the memorandum of instructions for the SSBs which considered applicant's record for promotion.

My phone number is defense switched network 487-5247 if we can be of further assistance in this matter.

s/
SHARON A. BRANCH, Lt Col, USAF
Ch, Appeals and SSB Branch
Dir for Personnel Prgm Mgmt

Attachment:
Memorandum of Instructions, 15 Nov 93

MEMORANDUM OF INSTRUCTIONS
SPECIAL SELECTION BOARDS
PROMOTION AND SELECTIVE CONTINUATION
15 NOVEMBER 1993

These boards are being convened under the provisions of title 10, United States Code; DOD directives 1320.8, 1320.12, and 1400.33; and Air Force regulations 36-12 and 36-89. The purpose of the boards is to consider officers of the Line, Judge Advocate General Department, Nurses Corps, Medical Service Corps, and Biomedical Sciences Corps, for promotion to captain through colonel or selective continuation.

For special selection boards, quotas are not provided. Selections are made by comparing the consideree's record with the records from the lowest scoring records of officers selected for promotion or selective continuation and the highest scoring records of nonselectees from the original board.

You must act in the best interest of the Air Force and not any particular command, specialty, or group. While you are here you work directly for me under the supervision of the board president, who is a nonvoting member and performs administrative duties to ensure the boards are conducted in accordance with title 10, United States Code; DOD directives; Air Force regulations; and my guidance. The board president has no authority to determine any matter that would constrain the board from recommending for promotion or selective continuation those officers best qualified to meet the needs of the Air Force.

You will use the whole person concept to assess such factors as job performance, professional qualities, leadership, depth and breadth of experience, job responsibility, academic and professional military education, and specific achievements.

You will be scoring the records of highly specialized officers who, because of mission requirements, may have a

narrow range of duties when compared to others who have a broader range of experience. The Air Force needs officers who are both highly specialized as well as generalized.

For the Line competitive category, joint duty experience is an extremely important consideration for promotion. The law requires that the qualifications of officers assigned to joint duty be such that they are expected, as a group, to be promoted at a rate not less than the rate for all Air Force officers in the same grade and competitive category. There are three objectives: (1) officers who are serving on, or have served on, the Joint Staff are expected to be promoted at a rate not less than the rate for officers who are serving on, or have served on, the Service Headquarters Staff; (2) joint specialty officers are expected to be promoted at a rate not less than the rate for officers who are serving on, or have served on, the Service Headquarters Staff; and (2) officers who are serving in, or have served in, other joint duty assignments, are expected to be promoted at a rate not less than the Air Force average rate. It is important that these statutory objectives be met.

When you see reports from joint activities or from activities outside or within the Air Force that were written by supervisors from another service or by a civilian, give them the same weight as you would give if an Air Force officer had written them.

For officers in the health professions eligible for promotion to lieutenant colonel and below, consider an officer's clinical proficiency and skill as a health professional to at least as great an extent as you give to the officer's administrative and management skills.

You may be considering officers recalled to extended active duty. Some recallees have had lengthy breaks in service for which little or no documentation is available. They were recalled to meet Air Force needs, and they should not be penalized because of their break in service. The same applies to other officers who may not

have had as much performance documentation in their folders as do most of their contemporaries.

Selection folders you may review may include OERs rendered from 1975 through 1978 with a controlled evaluation of promotion potential by the reviewer. Although many of you may have prepared controlled OERs, this may be your first opportunity to use them in the selection process. Remember, they were prepared under rules which required reviewers throughout the Air Force to apply rating controls consistently within each review group. This single control curve was applied without regard to qualitative differences between review groups, the ratee's job, unit of assignment, or level of responsibility. Additionally, these controlled ratings represented the reviewer's assessment of the individual's potential relative only to the others in the same grade in that review group during the rating period involved. You must thoroughly and objectively assess each of these ratings within the context of the rules under which they were rendered and carefully consider them in relation to other OERs and information in the selection folder. In summary, the controlled reports constitute only a small part of the officer's entire record so they should not negate or diminish the importance of the other information.

Assess academic and professional military education accomplishments in terms of how they enhance performance and potential. Do not give disproportionate weight to the mere fact that an officer has completed advanced education. Do not consider completion of PME as a pass-fail requirement. The overriding factor must be job performance.

Your evaluation of minority and women officers must clearly afford them fair and equitable consideration. Equal opportunity for all officers is an essential element of our selection system. In your evaluation of the records of minority and women officers, you should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization policies or

practices, may have placed these officers at a disadvantage from a total career perspective.

In your final report, you must identify any officers whose records, in your opinion, indicate they should be required to show cause for retention on active duty.

You are prohibited from considering an officer's marital status or the employment, educational, or volunteer service activities of an officer's spouse. If you see such information in the records you review, you will disregard it.

You may also see performance reports documenting the achievements of officers in implementing the 1989 defense management report to the president. Give specific consideration to these achievements.

Each of you (the president, members, recorders, and administrative support personnel) is responsible to maintain the integrity and independence of this selection board, and to foster the careful consideration, without prejudice or partiality, of all eligible officers. Department of Defense directive 1320.12 provides specific rules governing the conduct of officer selection boards and the actions of the selection board personnel.

You must pay particularly close attention to the rules governing communications with and among other board members, the information authorized to be furnished to you, and the procedures you should follow if you believe that the integrity of this selection board has been improperly affected.

You may not receive, initiate, or participate in communications or discussions involving information that DOD directive 1320.12 precludes from consideration by a selection board. You are to base your recommendations on the material in each officer's military record, any information I have provided to the board in accordance with DOD directive 1320.12, and any information about his or her own record communicated to you by individual eligible officers under regulations I have issued. In your deliberations, you may discuss your own personal

knowledge and evaluation of the professional qualifications of eligible officers to the extent that such matters are not precluded in law, DoD directive 1320.12, or an Air Force regulation from consideration by a selective board or inclusion in an officer's military personnel record. You may not discuss or disclose the opinion of any person not a member of the board concerning an officer being considered unless that opinion is contained in material provided to the board under the provisions of DoD directive 1320.12.

I am the only person who may appear in person to address you on any matter. All communications with this board, other than those that are clearly administrative, must be in writing, given to each of you, and made part of the board's record. I have designated in writing those persons authorized to provide routine administrative information to you.

Before the report of the selection board is signed, the recommendations may be disclosed only to members of the board, recorders, and those administrative support personnel I have designated in writing. After you sign the board report, only the recommendations of the board may be disclosed. Except as authorized by DoD directive 1320.12 and section 618 of title 10, United States Code, the proceedings of the board may not be disclosed to any person not a board member or a board recorder.

If at any time you believe that you cannot in good conscience perform your duties as a member of the board without prejudice or partiality, you have a duty to request relief by me from this duty. I will honor any such request. If you believe that the integrity of the board's proceedings has been affected by improper influence of military or civilian authority, misconduct by the board president or a member, or any other reason, you have a duty to request from me or the Secretary of Defense relief from your obligation not to disclose board proceedings and, upon receiving it, to report the basis for your belief.

Upon completion of board deliberations, you will, as a minimum, certify in your report to me that:

(1) To the best of your knowledge, the board complied with these instructions;

(2) That you were not subject to or aware of any censure, reprimand, or admonishment about the recommendations of the board or the exercise of any lawful function within the authorized discretion of the board;

(3) That you were not subject to or aware of any attempt to coerce or influence improperly any action in the formulation of the board's recommendation;

(4) That you were not party to or aware of any attempt at unauthorized communications;

(5) That, to the best of your knowledge, the board reviewed the records of each officer whose name was furnished to the board;

(6) That the officers recommended for promotion are, in the opinion of the majority of the members of the board, fully qualified and best qualified to meet the needs of the Air Force among those officers whose names were furnished to the board; and

(7) That the officers recommended for the continuation are, in the opinion of the majority of the members of the board, fully qualified to meet the needs of the Air Force among those officers whose names were furnished to the board.

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC 20330-1000

OFFICE OF THE ASSISTANT SECRETARY

AFBCMR
1535 Command Drive, EE Wing, 3rd Flr
Andrews AFB, MD 20331-7002

Mr. Gregory C. Porter
1429 Birch St, Lot # 14
Canon City, Co 81212

Dear Mr. Porter

The attached advisory opinion was obtained by the Air Force Board for Correction of Military records (AFBCMR) in regards to the court remanding your case back to the Board. The advisory is provided for your review and comments.

You have 30 days from the date of this letter to respond and/or submit additional matters to the Board. However, in view of the court's suspense of 16 January 1995, early submission of your response would be appreciated.

Sincerely,

s/
RAYMOND H. WELLER
Chief Examiner
Air Force Board for Correction
of Military Records

Attachment:

Ltr, AFMPC/DPMAJA, dtd 9 Dec 94, w/atch

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5007

GREGORY C. PORTER,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

BRIEF FOR THE PLAINTIFF-APPELLEE, GREGORY C. PORTER AND CONDITIONAL MOTION FOR REMAND TO THE LOWER COURT

[Principal Brief Omitted]

CONDITIONAL MOTION FOR REMAND TO THE LOWER COURT

In support of this motion, Porter relies upon the Joint Appendix (JA) filed in this appeal, the Air Force's appellate brief (App. Br.), and the Addendum attached to this filing (A)

This Court has inherent authority to protect the integrity of its proceedings. Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946); United Air Lines, Inc. v. Civil Aeronautics Board, 281 F.2d 53 (1960). Here, there are anomalies in the administrative record and

other evidence which strongly indicate that the AFBCMR's 1995 Second Addendum (A 63-76) resulted from illegal ex parte communications between the AFBCMR and the Air Force's litigation counsel.

As explained in Porter's principal brief, the Second Addendum was an extraordinary attempt by the Air Force to substitute a radically new agency theory after the lower court granted Porter summary judgment in 1994. The Second Addendum was all the more remarkable for its inclusion of a pointed and erudite rebuttal (complete with citations of authority, legislative history, and statutory analyses) to the lower court's order in Porter's favor. Indeed, this rebuttal is so refined that it is adopted virtually in toto in the Justice Department's appellate brief. A partial list of the similarities between the Second Addendum and the Air Force's appellate brief includes the following:

- The legislative history of Section 628 states that the purpose of that section is to determine whether the officer would have been selected if his pertinent records had been properly considered by the prior board, unfettered by material error. A 67; App. Br. 30.

- Under Section 628, it is not necessary for an officer to be on active duty at the time of SSB consideration. A 67; App. Br. 27-28.

- Section 619 (which discusses eligibility for promotion) appears in a separate subchapter of Chapter 36 and is not specifically incorporated into 10 U.S.C. § 628. A 68; App. Br. 31.

- The most reasonable interpretation of section 628 is that the term "officer" applies to the status of the individual at the time of the original promotion

consideration. A 68, App. Br. 31.

- If Section 628 does not apply to former officers, Secretary has authority to convene SSBs under 10 U.S.C. § 8013b. A 68; App. Br. 28.

- AFR 36-89 provides that SSBs may be convened for separated officers. A 69; App. Br. 29.

- Evensen, 654 F.2d 68, does not support the court's conclusion that referring an officer's record to an SSB is tantamount to voiding his prior promotion passover. A 72; App. Br. 16.

- It was improper for the court to rely upon Evensen, supra, and Doyle, supra, because they were decided prior to DOPMA. A 72; App. Br. 37.

- The provision in Section 628 that if an officer is not recommended for promotion by the SSB, the officer incurs no additional failure of promotion would be incongruous if the original nonselection had already been voided or expunged. A 72; App. Br. 24.

- Prior to DOPMA, the BCMR was required under Engels, supra, to apply a "causal nexus" test; however DOPMA mooted the "causal nexus" test. A 73; App. Br. 38.

The *amicus curiae's* entry into this case in or about April of 1997 brought to light a disturbing fact. There is no legal advisory opinion in Porter's AFBCMR record and the AFBCMR panel members and staff who were supposed to have written the Second Addendum are all non-attorneys. A 1-6, A 58.

Not only is it inherently incredible that the non-lawyers on Porter's AFBCMR panel and on the AFBCMR staff could have written the pointed legal arguments contained in the Second Addendum without ex parte assistance, the Second Addendum contains a legal argument that is contrary to the Air Force's official advisory position in the AFBCMR at that time. The Second Addendum argues that 10 U.S.C. § 628, enacted in 1980, mooted pre-DOPMA case law, including the "causal nexus" test. At the very same time that authors of the Second Addendum were advancing this novel theory in Porter's case, however, official advisories which were filed in the AFBCMR were relying upon the "causal nexus" test as the operative standard. A 59, A 91-93. In other words, the Second Addendum contains legal arguments which appear to have been designed to deceive the court about the AFBCMR's practices and standards.

In addition, there are at least a dozen anomalies in the Second Addendum which suggest that the middle portion of the Second Addendum (which includes the legal analysis and the findings of fact) was generated outside the AFBCMR. The supplemental statement of Major Larry Neptune (USAF Ret.) (A 56-62) notes, for example, that the middle portion of the Second Addendum is spaced slightly differently from the beginning and end of the Second Addendum--an anomaly that is consistent with the middle portion being pasted in from another document. In addition, there are differences in the date style: the beginning and end of the Second Addendum use military-style dates and the middle portion uses civilian-style dates.

It has been officially documented that the beginning of the AFBCMR's Report of Proceedings is prepared before the AFBCMR meets to consider the case. A 13. That fact could explain why the end of a BCMR report (which contains the board's rationale and decision) might differ in style and format from the beginning (which gives the pre-decisional history). It does not explain, however, why the

middle portion of the Second Addendum containing the legal and factual discussion is different from both the predecisional history in the beginning and the final decision at the end.

Other peculiarities noted by Major Neptune (and confirmed by the amicus' independent review) include anomalies in the font, content, and style of the Second Addendum, the selective exclusion of evidence supporting the lower court's fact-findings, the absence of a statement of the board members' vote (required by 32 C.F.R. § 865.20), the absence of a date stamp at the beginning of the Report, and a stand-alone faxed signature page at the end. All of these details indicate that the Second Addendum differed markedly from the standard output product of the AFBCMR.

A plausible explanation for the anomalies noted above was provided on April 3, 1997, when the Department of Defense issued a Report (the BCMR Report) on the military departments' Boards for Correction of Military Records. A 7-27. The sections of the Report concerning the Air Force were based on a review of the AFBCMR conducted by the AFBCMR's very own Executive Director, Mr. Mack Burton. A 8. Although the BCMR Report was clearly not based on an independent assessment, it nevertheless noted that "[in] exceptional cases, Board members engage in ex parte communications with officials involved in the dispute" and that"[t]he Military Department Boards' occasional reliance on ex parte communications" was an area where there was a need for improvement. A 21, 26.

Corroborating the BCMR' Report's finding that, in extraordinary cases, there are ex parte communications in BCMR proceedings are the attached statements of Col. Harold Yaskovich (USAF Ret.) and Major Larry Neptune. Col. Yaskovich's statement (A 28-53) includes an internal AFBCMR document showing that Mr. Burton arranged a meeting between "an officer from Litigation" and the AFBCMR panel members who were newly assigned to

consider a group of important AFBCMR cases known as the "Stewart cases" (A 29). This document includes Staff Summary Sheets that resolution of the AFBCMR's Stewart cases was orchestrated by the Air Force Litigation Division (JACL). It shows that items on the agenda for the AFBCMR panel's meeting with the officer from Litigation included whether the AFBCMR should continue to waive its three-year statute of limitations in the Stewart cases (A 32). A memorandum by Mr. Burton even states that one of the three AFBCMR panel members could not be present at the meeting with the Air Force's defense counsel but that whatever the others decided would be acceptable (A 29).

The outcome of the AFBCMR's behind-the-scenes coordination was that the new panel members changed the AFBCMR's policy and began to assert limitations as a defense in the AFBCMR. A 56. Another outcome was that the AFBCMR denied relief in all Stewart cases--even cases which were indisputably meritorious--so that rather than awarding back pay to all in the AFBCMR, the Air Force was able to limit its financial exposure by settling only with those who had the resources to appeal in federal court (and who were able to survive defenses based on limitations and laches).

Major Neptune's statement (A 54-55) shows that Mr. Burton secretly coordinated with the Litigation Division to delay the Stewart cases so that the Justice Department could avoid liability on limitations and laches grounds. His statement also demonstrates that, under Mr. Burton's direction, the Air Force Litigation Division *wrote* portions of the AFBCMR's decisions in cases remanded to the AFBCMR. Id.

In short, in addition to the disturbing and anomalous circumstances surrounding the Second Addendum, there is cause for concern that the current Executive Director of the AFBCMR, Mr. Burton, has a history of permitting the Air Force's Litigation Division (JACL) to secretly participate in

and write the AFBCMR's decisions in cases involving remands and important federal court issues. A 54-56.

The rules and regulations governing the AFBCMR are set forth in Part 865, Title 32 of the Code of Federal Regulations. JA 401-05. Under these regulations, the record must reflect the vote of the members of the AFBCMR panel, 32 C.F.R. §§ 865.18(c) and 865.20; the applicant must be afforded access to all non-privileged and non-classified records considered by the AFBCMR (¶ 865.14); advisory opinions may not compromise the AFBCMR's impartiality (¶ 865.18(a)); only members of the Board and its staff will be present during board deliberations (¶ 865.18(a)); the record of proceedings must identify every board member present (¶ 865.20), and the record of proceedings must include all documents relied upon by the Board and a transcript of all testimony (id.). In short, if there was a legal advisory opinion which went to the merits of the case, it should have been included in the record.

The evidence suggests that Air Force litigation counsel secretly inserted their litigation position into an AFBCMR decision, so that the Air Force could then ask a reviewing court to defer to it. In truth, it appears that there was no "agency action;" instead, there were strategic maneuvers by government attorneys to provide themselves with additional ammunition on appeal. Cf. Bowen v. Georgetown University Hospital, 488 U.S. 204, 212 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.") If indeed, this is what the Air Force has done, it has grossly misused the AFBCMR process and, in the process, has undermined the credibility of all the conclusions set forth in the Second Addendum.

CONCLUSION

There is ample justification in this case to ignore the Second Addendum on the ground that it post-dated the lower court's decision to grant partial summary judgment in Porter's favor. If the Court follows that approach, no

remand will be necessary in order to ensure the integrity of this proceeding. Unfortunately, because this case involves a dispute between the military and a servicemember, there is a distinct possibility that this Court's policy of deference will prompt it to consider "evidence" in the military's favor even if it was untimely presented. Indeed, the Air Force's appellate strategy in this case is *predicated* upon the belief that this Court will overturn the lower court on the basis of deference to the Second Addendum.

Mr. Porter wishes to avoid the delay and inconvenience of a remand if at all possible; however, if there is a possibility of this Court using a potentially fraudulent document to reverse the judgment of the lower court, he feels that he has no choice but to request remand. By filing this motion, Porter is not asking this Court to find that the Air Force or any of its attorneys have engaged in corrupt practices in one or more AFBCMR cases. He understands that allegations of that nature must be proven conclusively and that the lower court is the appropriate forum for both ensuring complete development of the facts and deciding issues of credibility. What Porter is arguing is that there are unanswered questions about the integrity and legality of the Second Addendum which can only be answered by (1) ignoring the Second Addendum or (2) remanding the case to supplement the record with reliable and trustworthy evidence of how the Second Addendum was created.

If this case is remanded, Porter will not seek to reopen the issue of his entitlement to back pay beyond the date ordered by the lower court. If it is determined that the Air Force or its representatives attempted to commit a fraud upon the Court, however, he intends to request court-ordered sanctions.

The *amicus* agrees with this Motion and the government opposes it.

PRAYER FOR RELIEF

WHEREFORE, Porter asks that this Court grant him the following relief. In the event that remand is necessary to avoid judicial reliance upon the Second Addendum, Porter requests an order of remand and such other relief as is necessary to serve justice in this matter.

November 17, 1997

Respectfully submitted,

Kathleen J. St. John
2900 Delk Rd. Ste. 700-306
Marietta, GA 30067
(770) 850-1175
(770) 953-1682 (fax)

ATTORNEY FOR
GREGORY C. PORTER

To Whom It May Concern:

1. I, Larry W. Neptune, declare under penalty of perjury pursuant to 28 U.S.C. 1746, that the following is true and correct to the best of my understanding:

2. While a Major on active duty with the United States Air Force, I was assigned from January, 1983, until September, 1990, to the Air Force Military Personnel Center (AFMPC), Randolph AFB, Texas. As Chief, Appeals and Analysis (also Chief, Analysis and Appeals), in the Promotion Division, I had direct day-to-day policy and administrative oversight for programs concerning correction and appeal of officer promotions (to include Regular Air Force appointment, and Selective Early Retirements) and I managed the Air Force Special Selection Board (SSB) program. In this position I had frequent contact with staff members of the Air Force Board for Correction of Military Records as well as the personnel staff within the Deputy Chief of Staff (DCS) for Personnel located in the Pentagon.

3. During 1983 and 1984 my office prepared Air Force advisory positions (AKA advisories) for the AFBCMR on several officers whose basis of complaint was a procedural one, i.e., the Air Force promotion selection boards did not have an adequate number of reserve officer board members on the selection boards which considered their files for promotions. We knew these cases as "Stewart Cases" captioned after the court decision in Stewart v. U.S. The advisory position we employed had been developed before I arrived and several elements within the position had been authored and/or approved by the Judge Advocate General. Although the Air Force position in this case was that no error had occurred, I noted and briefed my superiors that the select rate of reserve officers at boards composed as in Stewart was substantially lower than at boards with a more appropriate number of reserve board members. I was ordered not to

include this fact in the cases as it was contrary to the Air Force position. I later learned it was the AFMPC policy not to disclose facts favorable to an AFBCMR applicant's position.

4. During the handling of these "Stewart cases" I learned from AFBCMR and Headquarters Air Force DCS Personnel staff members that the Air Force approach was to delay them to the maximum extent possible. Colonel E. D. ("Dale") Shumway, Chief, Promotion Policy at DCS/Personnel at Headquarters Air Force, and Mr. William ("Pete") Randall, Executive Director of the AFBCMR both informed me that delay was part of the strategy in these cases as it would cause the statute of limitations to expire on many applicants. I understood from my conversations with Mr. Burton (then an AFBCMR examiner, now Executive Director) that the AFBCMR had asked for a legal review of the "Stewart issue" from an office in AF/JA (the Air Force Judge Advocate General). I also understood from Mr. Burton that Litigation Division (AF/JACL) deliberately caused this review to be delayed for more than a year. (The Litigation Division reports to the uniformed Judge Advocate General and represents the Air Force position in federal court.) I asked Mr. Burton how the AFBCMR would explain this delay if challenged in court and he told me it was the Litigation Division's problem to explain it. From my conversations with Mr. Burton it was also my understanding that the Litigation Division requested AFBCMR to identify a "special panel" of AFBCMR members who would cooperate with the Litigation Division staff in handling the Stewart cases.

5. From my association with the AFBCMR while at AFMPC, I learned that it was common practice for the Litigation Division to involve itself in certain types of AFBCMR cases, including legally significant cases and cases that were connected with a federal court action (for

example, a remand). In such cases, the Litigation Division gathered and reviewed the advisory opinions to be submitted to the AFBCMR. In cases I was familiar with at AFMPC, if the Litigation Division wanted to include or exclude specific information in an advisory opinion, they would contact the AFMPC Judge Advocate (AFMPC/JA) who would then work with the drafter of the advisory opinion to address the Litigation Division's concerns. It was also common knowledge among those who worked with and around the AFBCMR that the Litigation Division wrote drafts of portions of the AFBCMR's Reports of Proceedings (i.e., its decision) in significant cases like the Stewart cases as well as in other cases connected to federal court actions. I recall a group conversation after a court case wherein the court apparently commented that the AFBCMR decision on remand echoed the Air Force litigation position. One of the attorneys in the group (who was not on the AFBCMR) commented, chuckling, "Of course! We wrote the BCMR position." Mr. Burton specifically told me that the Litigation Division was responsible for drafting portions of the AFBCMR's Reports of Proceedings in the "Stewart cases" because the AFBCMR reports would later become the Air Force litigation position in cases appealed to federal court.

6. I have reviewed a handwritten memo dated October 20, 1986, which begins with, "Mr. Saunders AF/RDXP" and ends with the statement ". . . he didn't believe he would have any problems with whatever you and Mr. Wren decide." I am familiar with Mack Burton's signature and certain aspects of his handwriting, and I can attest that the October 20, 1986 memo appears to have been written by Mr. Burton.

s/
Larry W. Neptune
Major, USAF (Retired)

Executed this 7th day of June, 1997.

SUPPLEMENTAL STATEMENT OF MAJ. LARRY W. NEPTUNE (USAF RET.)

Under penalty of perjury pursuant to 28 U.S.C. § 1746, the following is true and correct to the best of my understanding. I have received no compensation for this statement.

On June 7, 1997, I gave a sworn statement regarding the Air Force's practice of secretly coordinating with the Litigation Division in resolving legally significant AFBCMR applications. This document supplements that statement.

7. I have reviewed the document attached to Colonel Harold Yaskovich's statement. The document provided by Colonel Yaskovich shows coordination between the AFBCMR and the Air Force Litigation Division (JACL) to deprive Air Force Reserve officers of relief in the AFBCMR. The documents also show that the panel members who decided the Stewart cases after 1986 (Wren, McGuire and Saunders) met with an officer from Litigation to discuss the statute of limitations and laches defenses and to make decisions about the Stewart cases. Before Wren, McGuire, and Saunders were assigned to the Stewart cases, the AFBCMR panel had a policy of waiving the three-year limitations period. With the appointment of Wren, McGuire, and Saunders, that policy was changed. The AFBCMR's arrangement in the Stewart cases was that only officers who appealed to the courts would be given back pay--even though the Air Force knew the officers had valid AFBCMR claims. The Justice Department settled cases as they were appealed but first attempted to block the service member with technical defenses like limitations or laches. The advantage to the Air Force under this arrangement was that: (1) it was so difficult, expensive, and time-consuming for the officer to obtain back pay that relatively few officers attempted it and (2) the Air Force was able to avoid paying dozens of claims

by delaying the case in the AFBCMR so long that the Justice Department was able to win on with limitations and laches in federal court.

8. As noted in my earlier statement, while serving in the Air Force, I had close dealings with the AFBCMR. Since retiring from the Air Force in 1990, I have been a private consultant to Air Force servicemembers seeking relief in the AFBCMR. In both capacities, I have reviewed hundreds if not thousands of AFBCMR decisions.

9. At the request of Kathleen St. John, I have reviewed the Second Addendum to Report of Proceedings in the Matter of Gregory C. Porter (the Second Addendum) (attachment 1) as well as the other AFBCMR decisions from Porter's case (attachments 2, 3, 4). Based on my knowledge of the AFBCMR's historical practices, the importance of Porter's issue to the Air Force, and anomalies in the Second Addendum, it is my opinion that there is the distinct possibility of wrong-doing in Porter's case and that a full inquiry is needed.

10. The following aspects of the Second Addendum are atypical of the AFBCMR's opinions.

a. The section of the Second Addendum captioned, "The Board Concludes That" (pp. 5-15) is written with different type-spacing than the rest of the document. The letters all appear to be from the "Courier" family of fonts. I was not able to duplicate the different spacing in the Second Addendum using any standard spacing options such as one-and-a half-space or double space. However, changing between fonts from the Courier family does produce results identical to the type and spacing found in the Second Addendum. The first part of the Second Addendum and the last part of page 15 are spaced the same as the auto spacing for "Courier" font at 12 points and the middle part (pp. 5-15)

is spaced the same as the automatic spacing for "Courier New" font at 12 points. The "Courier New" font automatically adds more space between the lines than "Courier" font. It is possible to duplicate the line spacing of the middle part using plain Courier font; however, that requires the user to customize the line spacing for that section of the opinion, a task rarely undertaken.

b. I am not aware of having ever seen another AFBCMR decision that has the line spacing of the middle portion (pp. 5-15) of the Second Addendum. The standard format for an AFBCMR opinion is that of the earlier AFBCMR decisions in Porter's case and in the first part of the Second Addendum.

c. Another difference between the middle part of the Second Addendum and the rest of the document is the format of the dates. The dates in the middle part are typed in the format used in the civilian world (month/day/year). The first and last parts of the Second Addendum use military-style dates (day/month/year).

d. Another unusual aspect of the Second Addendum is that it appears to have been typed in a Courier font that is different from the Courier font typically used in AFBCMR decisions. The capital "B" in the Second Addendum is different from the "B" in Porter's earlier decisions and different from the "B" in the other AFBCMR decisions in my files. In addition, the size of the type is larger in the Second Addendum.

e. The content of the middle section of the Second Addendum is also highly unusual. I have never seen a detailed legal argument in an opinion allegedly authored by the AFBCMR. In cases I have seen, the legal review was developed during the staff advisory process. In each of these cases, the advisory opinion(s) was provided to the member

for comment and merely adopted by the AFBCMR (see for example, p. 3 of the Record of Proceedings in Porter's case dated 24 Apr 89 (attachment 3)). It is very rare for the AFBCMR to cite a single case in an opinion--even when there are lawyers on the AFBCMR panel assigned to the case. There are no attorneys on the AFBCMR staff. And, in this case, there appear to have been no attorneys on the panel that decided Porter's case. I personally know panel members Bennett and Rogers because I used to brief them. It is my clear understanding that neither of these individuals is an attorney. My inquiries regarding the third panel member, Bowling, have revealed that he was assigned in civil engineering.

f. I also note that the style of the middle section of the Second Addendum is highly atypical. The usual style of an AFBCMR opinion is very concise and abbreviated (like the style in Porter's earlier AFBCMR opinions). The middle part of the Second Addendum, however, is written instead in a much more persuasive style. The middle part uses words such as "instant case," "unfettered," "does not contemplate, " and "to the contrary" that are not at all typical of the AFBCMR's style. The paragraphs are also very long, with numerous connecting sentences and ideas within each paragraph. The AFBCMR's typical style is to enumerate different points separately in short, concise paragraphs. Even in longer paragraphs, the AFBCMR's sentences are usually quite short and to the point. In addition, the typical style of an AFBCMR opinion is to underline case names, not to type them in bold italics.

g. I also question where the AFBCMR board members became familiar with the Dowds, Evensen, Dodson, and Braddock cases without a legal advisory opinion. The Second Addendum states (on p. 5) that the AFBCMR reviewed the legislative history of Section 628 (which is mentioned in the December 9, 1994 advisory

opinion from AFMPC), AFR 36-89, and 10 USC 628, but it does not say that the AFBCMR reviewed case decisions. The Second Addendum is written as though the members were familiar with these cases; however, in the many years that my clients have been raising questions about the Air Force's SSBs I do not recall any of these cases ever being cited in any of the Air Force's advisory opinions or in the AFBCMR's opinions.

h. Another troubling aspect of the Second Addendum is that it contains a legal argument that is inconsistent with the legal advisory opinions being filed at that time by AFMPC and that is different from the Secretary of the Air Force's regulations. The Second Addendum argues that the AFBCMR does not determine harmful error under the "causal nexus" test because DOPMA overruled Engels. In the 1994-1996 time frame, however, legal advisory opinions filed with the AFBCMR relied upon the "causal nexus" test. Attachment 5 is a true and correct excerpt from an AFMPC advisory opinion that is typical of the advisories during that period. In addition, AFI 36-2501, ¶ 6.3.3, issued in 1996, requires the AFBCMR to determine harmless error before convening an SSB (attachment 6). The argument that DOPMA overruled Engels appears to have been developed only for the purpose of litigation in court since it is the direct opposite of the official position taken by the Air Force in the AFBCMR prior to 1997.

i. Another anomaly is that the factual discussion in paragraph 3(e) on pp. 12-13 is not supported by an advisory opinion filed in Porter's case. Instead, the discussion is lifted almost verbatim from advisory opinions in other cases in which I was a consultant. Not only did the AFBCMR violate its own procedures by not putting these advisory opinions in Porter's record and not giving him an opportunity to respond, it is clear that the AFBCMR was extremely selective in its discussion of the "facts." First, the

advisory opinion quoted by the AFBCMR related to lieutenant colonel selection boards where the select rate was 35%, not captain boards where the rate was 95%. Even if it were true that the quality of the panel's records was the same at the 35% level, it does not follow in the least that the quality would be the same at the 95% level. Second, while taking the liberty of searching through other AFBCMR files to find Air Staff advisories favoring the Air Force, the drafter(s) of the Second Addendum failed to discuss documentary evidence in AFBCMR files which directly refuted the Air Force position. One such piece of documentary evidence is a Talking Paper, maintained by AFMPC (a true and correct copy of which is at attachment 7), setting forth the Air Force's procedures for selecting benchmark records in the year that Porter's original selection board met. This Talking Paper shows that the Air Force picked the best quality panel gray zone records as benchmarks, and that the quality of the records in the panels' gray zones is not equal. Another document which was not disclosed by the drafter(s) of the Second Addendum was actual panel score data showing that there were significant deviations in scoring between and among different panels of the same board. The Second Addendum also neglected to disclose the complete absence of data supporting the Air Force argument that the gray zone records were qualitatively the same.

j. I have seen many instances where the authors of advisory opinions withheld facts that were favorable to the service member. It is highly irregular, however, for the AFBCMR to search through documents filed outside an applicant's AFBCMR record in order to support the Air Force's position. The AFBCMR is supposed to be neutral. It is not supposed to engage in ex parte processes to exclude evidence that favors the applicant .

k. I also note that there appears to be no date stamp on the Second Addendum. This is not typical.

l. I also note that there is no mention of the vote by the AFBCMR Board members. This sometimes happens in AFBCMR opinions but is not typical.

m. I also note that the last page of the Second Addendum is a faxed copy. This is not typical of an AFBCMR opinion.

12. All of the anomalies in the Second Addendum, combined with the AFBCMR's history of permitting the Air Force's Litigation Division to write portions of its opinions in remand cases, and combined with the fact that two key individuals in senior positions during my experience with the Board (Mack Burton and his superior Joe Lineberger) were also in charge of Porter, are alarming to me and should alarm this court. I believe the Air Force has fooled this Court in the past by causing it to approve "AFBCMR" opinions that were written by the Air Force, not by the AFBCMR. There is every indication that the Air Force is attempting to fool the court once again in Porter's case. I firmly believe that cross examination of the key participants in Porter's case will show a repeat of the Air Force's tactics in the Stewart cases and in other AFBCMR cases that were decided while I was at AFMPC.

13. If the Air Force attempts to avert a full inquiry by arguing against the authenticity of documents filed with Porter's motion, the Court should be aware that it is common practice for the Air Force to look in the wrong file, or to "lose" or destroy its official records, then to claim that it is unable to authenticate copies of those records in court. I have seen Air Force officials first claim documents were not authentic in one case and later authenticate those very same documents in another case. I have seen Air Force officials

first claim an applicant's sworn statements of fact on a promotion-related issue were false and in the realm of 'fantastic' but later under oath admit the applicant's facts were 100% correct. I have also personally witnessed officials at AFMPC find a document that was helpful to an AFBCMR applicant, then order its destruction.

s/
Larry W. Neptune
Major, USAF (Retired)

Executed this 18th day of August, 1997.

7 Attachments
1. Second Addendum to Record of Proceedings, Docket # 88-02149, undated
2. Record of Proceedings, Docket # 88-02149, 25 Sep 85
3. Record of Proceedings, Docket # 88-02149, 24 Apr 89
4. Record of Proceedings, Docket # 88-02149, 16 Jul 93
5. Excerpt, Memorandum for AFBCMR (Staff Advisory), 9 Feb 95
6. Excerpt, 36-2501, Officer Promotions and Selective Continuation, 1 Mar 96
7. Talking Paper on Selecting Benchmarks, (AFMPC/) MPCAB, 7 Jan 84

TALKING PAPER
ON
SELECTING BENCHMARK RECORDS

AFR 36-89, Chapter 5 (Special Selection Boards), para 5-5f: "The officer's record will be compared with a sampling of records of officers of the same competitive category who were and who were not selected by the original board(s)."

Recorder will (normally following completion of board report/analysis) select necessary benchmark records

Select the best quality of selects and nonselects out of the gray; keeping quality foremost in mind, select records with as much representation as possible (command of assignment, aero rating, career area, etc.)

For Line I/APZ benchmarks only: 5 records (selects/nonselects) will be pulled from each Line panels' gray (i.e., if a board has 4 Line panels, then (in total) 20 records of selects and 20 records of nonselects will be pulled); from this group, the recorder will choose the best 5 select and 5 nonselect records

For all other categories: 5 records (selects/ nonselects) will be pulled from a panel's gray

Ensure the best quality is selected from within the gray; i.e., choose records with quality OERs (ratings/indorsements/enthusiasm), most completed education (academic/PME), career progression (squadron/wing/MAJCOM/HAF tours), etc.

Avoid using records which may create problems later (MP officers or personnel career

area, those containing digest files, NYQ, Article 15, court-martial, suspected anomalies, etc.)

A listing and the benchmark records will be provided to MPCAJB as soon as practicable

MPCAB/Capt Rafferty/4901/bla/7 Jan 84

quota -- or his surrogate -- before it was given to the selection Board?
MR. PORTER: That's correct.
THE COURT: So, obviously the Secretary can add people to the list, but that's apart from the Selection Board process, in that correct?
MR. PORTER: Yes, ma' am.
THE COURT: Okay. I'm sorry, Mr. Swanson, please proceed.
CAPTAIN SWANSON: What then happens, Your Honor, is that all of those records are presented to the Selection board. I believe in Mr. Porter's case in the two Selection Boards which he met, there were five panels on each of those boards, each panel given a roughly proportionate share of the records meeting that Promotion board, and then are given a proportionate quota to promote out of that number.
For instance, if there were 100 officers eligible for promotion and there were five panels, each roughly would be given 20 candidates and would be given 20% of the quotas which would be 20% of 95 or however the math would work on that.
THE COURT: Right. So it's hypothetically possible that a candidate would have a somewhat -- could

receive an advantage if he were considered by the panel that had the least-qualified applicants; is that correct?
CAPTAIN SWANSON: Yes, Your Honor, I believe you could say that was correct. How that's remedied, is the records are given to the panel in reverse Social Security number order, and then they are randomly distributed between the panels on that basis.
THE COURT: Okay, but that doesn't address the question that there may be disparity between the gray zone from one panel to another.
CAPTAIN SWANSON: I think you could probably say that's correct, Your Honor, but what they try to do is by giving each panel a proportionate number of candidates and a proportionate number of the quotas, if you're discriminated against it's only within the people that you're being compared for promotion.
THE COURT: But that goes back to the point I just made which was that if you were before the panel that had much more qualified applicants, then your chances of surviving the 95% cut would be lower than the candidate who was presented to the panel with the least-qualified applicants.
CAPTAIN SWANSON: Yes, Your Honor, I would have to say that would be correct and one
THE COURT: -- So that -

CAPTAIN SWANSON: you know, they would try to avoid that by distributing the records in reverse Social Security -
THE COURT: No, I'm not suggesting that there is any attempt subrogate these panels on any such basis or, you know, to attempt to favor candidates by selecting the panel with which they will be reviewed, but it's a matter of probabilities, it's likely that one person -- two people with the exact same record going before two different panels, if there were a gray zone -- one might be selected and the other not.
CAPTAIN SWANSON: The gray zone is another issue that I'd be happy to address if Your Honor would like.
THE COURT: Okay. Well, by gray zone - - I may be misusing it -- I meant the ones as to, that were qualified but there was a question as to whether they would be added to make up what was left of the quota.
CAPTAIN SWANSON: Yes, Your Honor, I think that would be a fair conclusion.
THE COURT: Okay. And in this case, or at least in these two cases before these two Selection Boards, they reviewed the records of all of the candidates in their panel and what is the procedure there? They do prepare some written records?
CAPTAIN SWANSON: Your Honor -

THE COURT: -- and they --
CAPTAIN SWANSON: -- what happens is after the records are distributed to, in this case five panels, and the promotion quotas are exhausted by each panel. For instance, when a panel gets a record it assigns each record -- each member of the panel assigns a record a score from 6 to 10 in half-point increments. Once they do that they take the highest scores and they promote all the people that they have a quotas for until they get to the score where they will exhaust the quota among tied candidates.

Among those tied candidates they are then required to rescore the records from top to bottom, whether it be 50 records or five records, they rescore those one through however many records they have and apply the quota until it's exhausted. Of those five panels the Selection Board secretariat then looks at a panel that they think has been the most consistent or possibly has the greatest number of candidates in it so they can select five candidates who had the score -- five candidates -- pick candidates overall where the score or the promotion candidates were exhausted -- the highest five that were promoted and five who were not promoted. And then in those 10 which could come from any one of the five panels

that make up the records that form the gray zone for that promotion board.
THE COURT: Okay. But wait a moment. So the gray zone consists of the highest five promoted?
CAPTAIN SWANSON. The highest five promoted within the– at the score which the promotion quota was exhausted and –
THE COURT: So that would be at the lowest score?
CAPTAIN SWANSON: - That' s correct
THE COURT: So it would really be the lowest five promoted?
CAPTAIN SWANSON: Well, for instance, Your Honor, if you had 20 candidates that the promotions score, that were not selected –at which the promotion quota was exhausted, what they would do, and they are only allowed to promote five of those – this is the regular Promotion Board – then those people would have been 1 through-5 and then there would have been 15 who were not promoted. They would have taken those five who were promoted and five of the remaining 15 and made those into the gray zone.
THE COURT: Okay. But you take the highest five of those not promoted, those that had the highest scores of the not-promoted Group?
CAPTAIN SWANSON: No, your Honor, that's not

correct. You can take any of those who were not promoted at that score but you would take the highest five of those who were promoted at the score when the quota was exhausted.

THE COURT: Okay, is the presumption then that there are a lot of people at the same score?

CAPTAIN SWANSON: Yes, your Honor, there are very large numbers of people with the same scores.

THE COURT: Okay.

CAPTAIN SWANSON,. Particularly at a captain's Selection Board because there are so many of that -- of officers going for that rank.

THE COURT: Okay. So it's basically then a random selection among those at that score, random among the not-promoted random among the promoted?

CAPTAIN SWANSON: Random among the not-promoted, but the highest five among those who --

THE COURT: But how do you determine the highest five if they are all of the same rank? I mean, if they' re all graded at the same level? They all have the same grade.

CAPTAIN SWANSON:. Okay, I need to back up again. When the Board members give them a score 6 to 10 and there are five people on that panel -

THE COURT: Right.

CAPTAIN SWANSON: -- some result in every candidate receiving a score from 50 to 30. Let's say that they got through, they awarded all the people who got 50 points, let's say all those people were promoted, then they got to 49. But let's say a score of 49 there were 20 officers with 49 points. And that's where the promotion quota was going to be exhausted. They would then at that point rank order these 20 candidates -

THE COURT: Okay. And that's being done on a per-panel basis?

CAPTAIN SWANSON: That's correct, your Honor.

THE COURT: Okay. So they would rank order just the ones at the lowest grade?

CAPTAIN SWANSON: That's correct, at the lowest score the promotion quota would be exhausted

THE COURT: Okay. I think I understand that. Mr. Porter, do you have any comment on this?

MR. PORTER: Well, the only comment I have, Your Honor, would be with respect to the gray zone itself again. When they take the, from the non-select, when they score those, those are random scores those aren't the top of the list there to determine, so any member below that was non-selected they could have selected -- to determine the gray zone area which means that still, even those with

the higher score that were non-selected may not be in random area.
THE COURT: -- not within one panel
MR. PORTER: Well, within one panel they take -- yes, you're correct.
THE COURT: So essentially are you arguing then that this panel system in unfair?
MR. PORTER: Well, the panel system is inconsistent and also yes it is unfair to the candidates because I'm to be compared with all of my peers, and this case I'm only compared with one-fifth of --
THE COURT: Well, if you're better than the lowest five who were promoted, then how are you disadvantaged?
MR. PORTER: Well, I'm disadvantaged from the standpoint that, for example, if I were on one panel with all -- let, a say for example, high-rated officers -
THE COURT: But that's the point that was made before, so that then the problem is that you disagree with the way that the Army selected the gray zone, not that you were unfairly compared to that gray zone.
MR. PORTER: Okay. Well, the gray zone then, if it is selected based upon the top five scores, for example, of those non-selected, then the gray zone would

have to be, I guess would have to fall where it may. I don't – maybe I'm not understanding completely --
THE COURT: Okay, I'm just trying to figure out whether you're challenging the way the gray zone is formulated, or whether you're challenging the determination that you would have not been promoted out of the gray zone.
MR. PORTER: Well, I would say in that case, I'm challenging both. The gray zone initially and the way it was established by board from panel to panel, and also I believe that I would have been selected for promotion if it was properly arranged and they had completed that and exercised the promotion quota after all records were rated. For example, if they had rated all records first and had the scores and then applied the promotion quota for the whole – the quota to the whole Board –
THE COURT: So you're saying again that you don't approve of the panel system?
MR. PORTER: Right
THE COURT: Okay, well, I don't think there is much this Court can do about that.
MR. PORTER: And, Your Honor, if I may?
THE COURT: Yes.
MR. PORTER: Also, with the Selection Boards, I also presented the staff summary sheets which go into the

THE COURT: Okay. Mr. Bode, were you trying to say something?
MR. BODE: Excuse me, Your Honor, no, I was not.
THE COURT: Okay. Would you concede that that was something that should not have been before the Special Selection Board in light of the previous Board of Corrections order.
MR. BODE: There is no reason, Your Honor, that that should have been. I would contend that that should not be before the Special Selection Board.
THE COURT: What do you say to -- Captain Swanson, I guess -- to Mr. Porter's contention that someone else who appears to be less qualified -- you have the record that I have -- was promoted when he was not.
CAPTAIN SWANSON: Your Honor, I have done no inquiry and I do not know if the person whose record is represented by the documents that Mr. Porter has submitted even exists. I do not know if they met that Board. I just have no information on that person. I just can be of no assistance to the Court. I can certainly make an inquiry, but once again, I think we would be running into the same situation concerning the disclosure of records before the Promotion Board if I were to make that inquiry of the people at Randolph Air Force Base, Texas.

THE COURT: I'm sorry, "the people at Randolph Air Force Base", what do you mean by that?
CAPTAIN SWANSON: The people at the Military Personnel Center and the Selection Board Secretariat.
THE COURT: So you would be asking the question of the administrative support officers not of the Selection Board itself?
CAPTAIN SWANSON: That's correct. Just for Your Honor's information, they have a staff down there that is in charge of the records and setting up the Boards. However, the Board members themselves are line officers who are stationed at locations throughout the United States and overseas.
THE COURT: Okay. And are you contending that you cannot make a search to determine whether this was before the Special Selection Board? .
CAPTAIN SWANSON: Well, I wouldn't think that Lieutenant Wimmer's record was before the Special Selection Board because I don t think she ever requested one. I think what Mr. Porter was contending is that she met the same regular Selection Board that he did.
THE COURT: Yes. That she was promoted by the original Selection Board and therefore she must have been above the gray zone, or promoted out of the gray zone and

he wonders why he was[n't]. But this could be explained by the
discrepancy of treatment between panels. Is that correct?
CAPTAIN SWANSON: That' a correct, Your Honor, it could be.
THE COURT: Okay. This is just a back -- oh, back to the statement that was on Exhibit 29A, the Composite assessment, are you contending that this is something you cannot provide to as because that was a record before the Selection Board?
MR. BODE: No, Your Honor, I'm not, and I believe from looking at that and Exhibit A30, I believe that might have been something that was compiled by the
Plaintiff himself, because this was nothing that the Air Force would have done of a composite assessment of the other lieutenant at 30A, and that seems to be the same type thing that was done at 29A.
But if in fact that was generated by the Government and it was a promotion record, I would be contending that that's something we would like to brief before we return to Court --
THE COURT: You wouldn't know if these composite assessments are records that are generally before the Selection Board, or prepared by a Selection Board?
MR. BODE: I'm sure they're not prepared by a Selection Board, Your Honor, they may be prepared by the

as it stands. However, Your Honor, if I may refer back to my initial complaint. My initial Complaint was about the promotion system and the Officers which make up the promotion system and the Correction of Military Records Board being arbitrary and capricious, not just the record.
THE COURT: Okay, so what do you contend -- what's the basis for your contention that the Board of Military Corrections is arbitrary and capricious?
MR. PORTER: That, ma'am, they did not take, after I had submitted sufficient documentation to show
THE COURT: To show -
MR. PORTER: --conspiracy, altering records.
THE COURT: No, but the issue is evidence regarding impropriety before the Special Selection -- by the Special Selection -- before the Special Selection Board.
MR. PORTER: Oh, nothing by the Special Selection Board, Your Honor. The propriety, or what I had submitted, was based upon the promotions system and the officers and the acts which they did which does indeed affect my promotion. The actions were irregular --
THE COURT: But you had said earlier that you didn't think the record before this special selection Board was correct.
MR. PORTER: It was not correct so far as duty

history, ma'am, which may very well have affected or influenced an officer one way or another based upon Col. Herrington's comment in his letter that the officers of the Board are briefed upon gaps in record, they' re briefed upon various things and are told to disregard them.

And it's quite interesting to state that my record's duty history is not a complete duty history of my job. And. based upon those records not being correct, then the Board could not have reviewed my file appropriately.

THE COURT; But do you have any reason to believe that had that record been correct you would have been promoted?

MR. PORTER: The only thing that I can present, your Honor, would be that the record itself showing the level of responsibility that I did have would and may have -- however, I can't say because the judgment was based upon the officers sitting on the Board -- could very well have swayed them to my side and very well selected me for promotion. And, again, with the gray zone, I'm not sure which gray zone was utilized for those Boards which I met.

Because with the selection -- the officer's selection, Your Honor, is based upon three factors. It's based upon factor number one, the OER history, or the OERs. Number two is the professional military education

and also the decorations which an officer has, and those could be the offsetting factors.
THE COURT: Okay. How about this issue which is what was before the Special Selection Board, whether it actually had records before it of officers in the gray zone for the previous two selection panels -- not panels, boards.
MR. PORTER: Again, Your Honor, not being there at the Board, I can only contend that there may have been
records there, but -
THE COURT: -- some allegation that records were lost, or destroyed -- you're talking only about the records that were prepared by the previous Selection Boards and not the not records before those Boards. In other words, the officer records.
MR. PORTER: Yes, ma'am, the records that were -
- could have been lost or could not have been reviewed, or
may not have been reviewed would have been before the initial Selection Boards.
THE COURT: But we have no evidence that they did not have the record – they didn't have a sampling of officers in the gray zone as required?
MR. PORTER: That I cannot – that I don' t know.
THE COURT: There's no evidence of that?
MR. PORTER: No, ma'am.

THE COURT: Okay. Well, it still seems somewhat strange to this Court that the Government could argue that the Board of Corrections would not be permitted to review the record or even the proceedings of the Special Selection Board or the selection panel. But I'm not sure that that is relevant in this case because Plaintiff clearly has not presented any evidence that suggests that the Board should have reviewed any at the material before the Special Selection Board, and surely there may be issues raised before the Board of Corrections required it to look at the Special Selections Board materials.

MR. PORTER: Your Honor, I think I heard what you were saying was that my contention was that I felt that the Correction of Military Records Board was arbitrary and capricious based upon the Special Selection Boards?

THE COURT: Um-hum.

MR. PORTER: Okay. I think it goes further than that, Your Honor, in that with the -- it wasn't necessarily just the Special Selection Board but the promotion system as a whole. And dealing with the issues the Correction of Military Records Board is there to review records, to look at complaints, and also, if there has been injustices and errors in the records, that they are to investigate -- they are the "investigative aspect

of the secretary of the Air Force" and have the authority to review those things should it so desire. And in pointing this out where the promotion system itself and the officers which affect that promotion system, and how the acts shown by altering of records and so on and so forth did indeed affect my promotion status. It affected my promotion, the OER I did have removed, it was substantiated and therefore left a gap in my record which --

THE COURT: But a gap in your record alone is not a basis for invalidating a subsequent Special Selection Board proceeding because if that were the case there would be no purpose in convening a Special Selection Board after an OER were removed

MR. PORTER: There would be convened a Special - -

THE COURT: -- presumption that you would be promoted but for the gap in service.

MR. PORTER: Well, I was passed over twice, Your Honor, which meant that I did have to get out. My record was reviewed a third time, so it would have had to have gone before a Special Selection Board since I was out of the military. If I had been in the military and had been reviewed, then it may very well have been selected based

upon being compared with the next board that I would have met. So therefore, the Secretary of the Air Force --

THE COURT: My point dealt only with the issue of whether one could set aside – whether the Board of Correction could set aside what the Selection Board did based on the mere fact that the record before it had a gap as a consequence of the removal of an OER.

MR. PORTER: Well, not only a gap, Your Honor, but --

THE COURT: No, no. But do you believe that the Board should set aside – the Correction Board should set aside a Selection Board simply because there was a gap in the record due to the removal of an OER?

MR. PORTER: Not specifically for the removal of the OER, Your Honor, but as in my case the substantiation and statements pertaining to officers which I had pointed out --

THE COURT:But that's separate from the Special Selection panel, that's an entirely different line --

MR. PORTER: Yes, ma'am.

THE COURT: -- and we've been concentrating today basically on the arguments that you made regarding the Special Selection Board.

MR. PORTER: Yes, ma'am.

THE COURT: Okay, I don't think I'm going to

Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

No. 98-1689

In the Supreme Court of the United States

GREGORY C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DAVID M. COHEN
ANTHONY J. STEINMEYER
JAMES M. KINSELLA
ARMANDO O. BONILLA
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under 10 U.S.C. 628 and 1552, a Board for Correction of Military Records may correct the personnel record of an officer passed over for promotion and recommend that a Special Selection Board consider whether the officer should be retroactively promoted based upon the corrected record, without voiding the original non-promotion decision.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Chappell v. *Wallace*, 462 U.S. 296 (1983)	2, 10
Clinton v. *Goldsmith*, 119 S. Ct. 1538 (1999)	2
Doyle v. *United States*, 599 F.2d 984 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980)	7
Engels v. *United States*, 678 F.2d 173 (Ct. Cl. 1982)	7
Evensen v. *United States*, 654 F.2d 68 (Ct. Cl. 1981)	7
Hary v. *United States*, 618 F.2d 704 (Ct. Cl. 1980)	7
Sanders v. *United States*, 594 F.2d 804 (Ct. Cl. 1979)	7, 10

Statutes:

Act of Oct. 17, 1998, Pub. L. No. 105-261, Div. A, Tit. V, § 501(b)(1), 112 Stat. 2001 (to be codified at 10 U.S.C. 628(b)(1)	6
Defense Officer Personnel Management Act, Pub. L. No. 96-513, 94 Stat. 2835:	
10 U.S.C. 617(a)	10
10 U.S.C. 628 (§ 105, 94 Stat. 2859)	2, 3, 6, 7, 8, 9, 10, 11, 13
10 U.S.C. 628(a)(2)	4
10 U.S.C. 628(b)(2)	4, 9
10 U.S.C. 628(b)(1)	2, 6
10 U.S.C. 628(b)(1)(A)	8
10 U.S.C. 630-637 (1994 & Supp. III 1997)	2

Statutes—Continued: Page

10 U.S.C. 1552 ..... 11, 13
10 U.S.C. 1552(a) 7
10 U.S.C. 1552(a)(1) 2

Miscellaneous:

H.R. Rep. No. 1462, 96th Cong., 2d Sess. (1980) 9

In the Supreme Court of the United States

No. 98-1689

GREGORY C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 163 F.3d 1304. The four orders of the Court of Federal Claims (Pet. App. 50-108) are unreported. The record of proceedings before the Air Force Board for Correction of Military Records (Pet. App. 109-134) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1998. A petition for rehearing was denied on January 20, 1999 (Pet. App. 48-49). The petition for a writ of certiorari was filed on April 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the military's statutory "up or out" personnel system, an officer twice non-selected or "passed over" for promotion to the next higher grade is generally subject to mandatory discharge. See 10 U.S.C. 630-637 (1994 & Supp. III 1997). A discharged officer may challenge his non-selection for promotion before a Board for Correction of Military Records (BCMR). A BCMR "may correct any military record * * * when * * * necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1). The Board's decision is subject to judicial review and can be set aside if the decision is arbitrary or capricious. See *Clinton* v. *Goldsmith*, 119 S. Ct. 1538, 1544 (1999); *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983).

The Defense Officer Personnel Management Act (DOPMA), Pub. L. No. 96-513, § 105, 94 Stat. 2859, codified in relevant part at 10 U.S.C. 628, authorizes the Secretary of the "military department concerned" to convene Special Selection Boards (SSBs) to determine whether an officer "should be recommended for promotion" when the officer "was considered for selection for promotion by a selection board but was not selected" and "the action of the board which considered the officer was contrary to law or involved material error of fact or material administrative error." 10 U.S.C. 628(b)(1).

2. Petitioner served on active duty as a Reserve Officer in the United States Air Force from 1981 to 1985, when he was honorably, but involuntarily, discharged after having twice been passed over for promotion to captain by promotion selection boards meeting in 1984 and 1985. Pet. App. 5, 51. Following his first promotion pass-over, in 1984, petitioner filed an

application with the Air Force Board for the Correction of Military Records (AFBCMR), claiming that the pass-over was invalid because the promotion board had before it an erroneous Officer Effectiveness Report (OER) dated January 1984. *Id.* at 5, 52.

After petitioner had been non-selected for a second time in 1985, the AFBCMR issued its decision holding that the January 1984 OER had unfairly underrated petitioner's promotion potential. The Board recommended that the OER be voided and that, under 10 U.S.C. 628, petitioner be reconsidered for promotion on a corrected record by two SSBs in lieu of the original selection boards for 1984 and 1985. Pet. App. 5. The AFBCMR did not, however, recommend that petitioner's original promotion pass-overs be voided—action which would have resulted in petitioner's constructive reinstatement and entitlement to back pay and benefits. See *id.* at 2. In 1986, the SSBs convened and determined that petitioner would not have been promoted by the original promotion boards even if they had considered the corrected records. *Id.* at 5, 53.

In 1988, petitioner appealed the SSBs' decisions to the AFBCMR, contending (1) that the removal of the challenged January 1984 OER had created a prejudicial gap in his military record; (2) that his duty titles had been incorrectly listed on some of his OERs; and (3) that a 1984 Letter of Evaluation attached to a November 1984 OER repeated the substance of the January 1984 OER and, thus, perpetuated its negative effect. Pet. App. 5, 54. The AFBCMR denied relief. *Id.* at 6, 55.

On appeal, the Court of Federal Claims held in 1992 that petitioner was not prejudiced by the gap in his records, but the court remanded the case to the AFBCMR to reconsider whether the misstated duty

titles or the 1984 Letter of Evaluation constituted a significant error or injustice and, if so, whether the error was harmless because petitioner would not have been promoted even with the errors corrected. Pet. App. 6-7, 50-83. On remand, the AFBCMR concluded that the 1984 Letter of Evaluation should be removed from petitioner's military personnel record and that the identified duty titles should be corrected. *Id.* at 7, 109-115. The AFBCMR found that, although the "recommended corrections will materially change" petitioner's record, it could not "conclusively determine[] whether or not [petitioner] would have been selected for promotion" by the original promotion boards. *Id.* at 7. The AFBCMR therefore recommended that petitioner again be considered, on the record as additionally corrected, by two new SSBs in place of the original promotion boards. *Id.* at 7-8. In 1993, the new SSBs convened and recommended that petitioner not be promoted. *Id.* at 8, 87.

3. In 1994, the Court of Federal Claims remanded the case to the AFBCMR to determine whether the 1993 SSB proceedings contained adequate records of other officers against which petitioner's record was compared. Pet. App. 8-9, 84-94.[1] The court also held that the AFBCMR impermissibly delegated to the 1993 SSBs the power to determine whether the flawed data presented to the 1986 SSBs amounted to harmless error, rather than making that determination itself. *Id.* at 8, 91-92. The court further ruled that, by referring petitioner's corrected record to the SSBs in 1986 and

---

[1] An SSB compares an applicant-officer's records against "benchmark records," *i.e.*, a sampling of the records of the group of officers previously selected and not selected for promotion by the original selection board. See 10 U.S.C. 628(a)(2) and (b)(2).

again in 1993, the AFBCMR necessarily voided the original pass-overs and petitioner was therefore entitled to be retroactively reinstated to active duty with back pay and related benefits. *Id.* at 9, 92-93. Upon the government's motion for clarification, the court ordered the military to correct petitioner's military personnel records constructively to show continuous active duty service from the date of his separation in August 1985 through at least six months after his second pass-over by the November 1993 SSB, pending further review by the AFBCMR. *Id.* at 9-10, 98-99.

On remand, the AFBCMR found that the 1993 SSBs had properly determined that petitioner would not have been promoted by either the original promotion boards or the 1986 SSBs. The AFBCMR also stated that the court improperly had assumed that the AFBCMR had intended to void petitioner's earlier pass-overs so as to reinstate him constructively to active duty with the right to back pay and related benefits. The AFBCMR's conclusions were set forth in a document entitled "Second Addendum to Record of Proceedings." Pet. App. 10-12, 116-134.

In 1996, the Court of Federal Claims affirmed the AFBCMR's decision that the 1993 SSBs contained no reversible error. The court, however, reiterated its earlier holding that the AFBCMR's original referral to the SSBs voided the initial promotion pass-overs and entitled petitioner to back pay and benefits from 1985, the date of his involuntary separation, through May 1994, six months after his non-selection for promotion by the 1993 SSBs. Pet. App. 13.

4. The Court of Appeals for the Federal Circuit reversed. Pet. App. 1-47. The court of appeals observed that petitioner did not argue that the 1993 promotion decisions by the SSBs "[we]re infected with

error" and thus petitioner had conceded "that he is now lawfully discharged." *Id.* at 13, 21. Rather, petitioner argued that, because the AFBCMR lacked the authority to refer his record to an SSB without first voiding his original pass-overs and vacating his discharge, he was entitled to back pay and benefits from 1985 until 1994. *Id.* at 3, 21-22.

Rejecting petitioner's contention, the court of appeals held that "an SSB's decision * * * relate[s] back to the date of the original selection board's decision[,] and * * * the SSB's decision * * * stand[s] in place of the earlier selection board decision." Pet. App. 24-25. The court further found that, "as a matter of statutory interpretation[,] * * * nothing in section 628 requires the constructive reinstatement—via the purge of at least one of the two passovers from the officer's record—of a twice passed over and discharged officer in order to present the officer's record to an SSB." *Id.* at 36.[2] The court also concluded that its reading was supported by the statute's text and legislative history. *Id.* at 24.

The court of appeals also canvassed precedent of the Court of Claims that had reviewed non-selection deci-

---

[2] The court of appeals also disagreed with the lower court's conclusion that petitioner must be constructively reinstated before he could be "an officer who is eligible for promotion" subject to review by an SSB under Section 628(b)(1). Pet. App. 35-36. The court of appeals explained that, based on "the certain retroactive character of the SSB deliberative process," "the word 'eligible' in section 628(b) * * * mean[s] eligible as of the time of the consideration of the officer's record by the selection boards whose decisions are later challenged." *Id.* at 36. In 1998, while this action was pending, Congress amended Section 628 to provide that SSBs may consider the promotion decision of any "person who was considered for selection for promotion * * * but was not selected." Act of Oct. 17, 1998, Pub. L. No. 105-261, Div. A, Tit. V, § 501(b)(1), 112 Stat. 2001 (to be codified at 10 U.S.C. 628(b)(1)); see Pet. 7-8.

sions before Section 628 authorized SSBs to determine on a retroactive basis whether a promotion decision contained prejudicial error. Pet. App. 25-32. The court explained that, under that body of law, "fundamental error, at least those affecting the composition of the deciding body," was not subject to harmless error analysis but instead was presumed to have affected the outcome of a non-selection decision and therefore the officer was entitled as a matter of course to have the pass-over voided and to be constructively reinstated with back pay. *Id.* at 32 (citing *Evensen* v. *United States*, 654 F.2d 68 (Ct. Cl. 1981), and *Doyle* v. *United States*, 599 F.2d 984 (Ct. Cl. 1979), cert. denied, 446 U.S. 982 (1980)). Where other errors were involved, however, the pass-over would not be voided or the officer constructively reinstated if the BCMR or the reviewing court determined that the government had proved that the error was harmless, *i.e.*, the error had no impact on the original pass-over decision. *Id.* at 25-32 (discussing *Engels* v. *United States*, 678 F.2d 173 (Ct. Cl. 1982), *Hary* v. *United States*, 618 F.2d 704 (Ct. Cl. 1980), and *Sanders* v. *United States*, 594 F.2d 804 (Ct. Cl. 1979) (en banc)).

The court of appeals then analyzed that body of law in light of the passage of Section 628. The court of appeals concluded that the harmless error rule "has no application" to cases covered by Section 628. Pet. App. 43. The court explained that harmless error analysis would duplicate the promotion decision by the SSB, *id.* at 41-43, and that the old rule "enmeshed the civilian corrections boards and the courts in the essence of promotion *vel non* judgments." The court accordingly found that, under 10 U.S.C. 628 and 1552(a), the AFBCMR had discretion whether to void previous pass-overs before recommending that an SSB consider

an officer's corrected record. Pet. App. 36-38. The court further stated that, "[i]n cases in which the error is found to be egregious, when the [AFBCMR] is sure of the need to void previous passovers," the court would "assume the [AFBCMR] will exercise its full authority." *Id.* at 38. "[I]n cases in which the [AFBCMR] lacks the confidence to make a fundamentally military promotion decision," however, the court explained that the AFBCMR "is not obligated to resolve an officer's promotion prospects by performing a harmless error analysis. Instead, the [AFBCMR] may recommend that the fundamental promotion determination be made by the SSB." *Ibid.*

ARGUMENT

Petitioner argues (Pet. 20-28) that the court of appeals departed from past precedent holding that an officer non-selected for promotion is entitled to constructive reinstatement and back pay unless the BCMR is satisfied that the government has proved that the error in the original non-selection was harmless. Petitioner further argues (Pet. 28-32) that Section 628 did not change that legal landscape. In his view (*ibid.*), Section 628 operates retroactively only when the SSB recommends the officer *for promotion*; when the SSB recommends that the officer *not be promoted*, petitioner contends that a SSB's decision does not relate back to the original non-selection decision and therefore the officer is entitled to back pay from the date of the original decision until the effective date of the SSB recommendation that the officer not be promoted. Those arguments lack merit.

1. Section 628 provides that the military may convene a SSB to determine whether an officer should be recommended for promotion when the officer origi-

nally was not selected for promotion by a board whose proceedings were "contrary to law or involved material error of fact." 10 U.S.C. 628(b)(1)(A). As the court of appeals observed (Pet. App. 36), nothing on the face of Section 628 supports petitioner's cramped reading that the statute applies only prospectively when the SSB decides not to recommend an officer for promotion.

The text of Section 628 indicates that the SSB's decision replaces the original non-selection decision, regardless of the outcome of the SSB's decision. Section 628(b)(2) requires the SSB to consider "the record of the officer as his record, if corrected, would have appeared to the board that [originally] considered him." Thus, Section 628 operates retroactively by dictating that the SSB replicate the original proceeding, based on the officer's corrected records. The court of appeals therefore correctly held that "an SSB's decision * * * relate[s] back to the date of the original selection board's decision[,] and * * * the SSB's decision * * * stand[s] in place of the earlier selection board decision." Pet. App. 24-25. That reading is moreover confirmed by the statute's legislative history, which indicates that the statute's purpose is "to provide a means to make a reasonable determination as to whether the officer *would have been selected* if his pertinent records had been properly considered by the prior board, unfettered by material error." H.R. Rep. No. 1462, 96th Cong., 2d Sess. 74 (1980)) (emphasis added).

Moreover, the court of appeals' decision prevents the windfall that would result from the adoption of petitioner's view. As the court of appeals observed, petitioner concedes that the SSBs' decisions in 1993 not to recommend him for promotion were free of error, and that the Air Force has lawfully discharged him. Pet. App. 13, 21; see also Pet. 18. Notwithstanding his con-

cession that the errors before the promotion boards in 1984 and 1985 and the SSBs in 1986 were not prejudicial, petitioner seeks constructive reinstatement, back pay, and related benefits for approximately nine years. That reading of Section 628 defies logic and frustrates the military's mission to retain only the "best qualified" officers "to meet the needs of the armed force[s]." 10 U.S.C. 617(a).

2. The court of appeals also correctly concluded that Section 628 renders inapplicable earlier decisions of the Court of Claims that required the AFBCMR to decide whether the officer would have been promoted absent the error in the original non-selection decision. Pet. App. 25-33, 42-43. As the court of appeals explained, the SSB's substantive recommendation whether to recommend an officer for promotion renders a harmless error analysis unnecessary: "[i]f the SSB decides in favor of promotion, the analysis would conclude that the government had failed to prove that the material error that drove the case to the SSB was harmless. If the SSB decided against promotion, the harmlessness of the error would have been shown." *Id.* at 42. The court of appeals therefore correctly concluded that its earlier case law had been superseded by Section 628.[3]

Contrary to petitioner's contention (Pet. 33-35), the harmless error rule also unduly involved judges and civilian members of the BCMRs in uniquely military matters. As the court of appeals explained, although prior law had recognized that "it makes no sense to

---

[3] Petitioner notes (Pet. i) that the Court of Claims' decision in *Sanders* v. *United States*, 594 F.2d 804 (1979), was cited with approval in *Chappell* v. *Wallace*, 462 U.S. 296 (1983). This Court in *Chappell*, however, merely cited *Sanders* for the proposition that BCMR decisions may be subject to judicial review under an arbitrary and capricious standard. See *id.* at 303.

order relief for a corrections application that alleges an error lacking any impact on the passover decision," there was no "statutory tool available to resolve the basic promotion issue," *i.e.*, whether the officer should be promoted notwithstanding the error. Pet. App. 32-33. The Court of Claims therefore adopted the harmless error rule. *Id.* at 32, 42-43. That rule, however, inevitably "force[d] the civilian corrections boards and the court into the * * * obligation to make essentially military promotion decisions." *Id.* at 33. The court of appeals therefore correctly concluded that, now that Section 628 authorizes SSBs to make promotion recommendations based on corrected records, "grafting [the harmless error rule] onto section 628" risks disrupting the "[p]roper allocation of civilian and military duties and responsibilities." *Id.* at 43.

3. Petitioner also argues (Pet. 25-29) that the decision below, by requiring an officer to show "egregious error" before the BCMR voids an original pass-over decision, is inconsistent with the BCMR's responsibility to protect servicemen under 10 U.S.C. 1552. That is not correct.

BCMRs are authorized under 10 U.S.C. 1552 to "correct any military record * * * when * * * necessary to correct an error or remove an injustice." That provision neither limits the BCMR's discretion to refer an officer's records to an SSB nor mandates that in doing so the BCMR must void a pass-over decision in all instances. See Pet. App. 44-45. Moreover, BCMRs retain their full authority under the court of appeals' decision "to assure that, if utilized, a section 628 SSB produces a reasonable determination of the officer's promotion prospects." *Id.* at 45. Thus, "[i]f an officer meets an SSB unsuccessfully and can point to a material flaw in the SSB's procedures arguably under-

mining the SSB's nonselection judgment, he may petition the corrections board to alter or void the SSB's decision." *Ibid.* Indeed, petitioner successfully challenged the SSBs' decisions in 1986 and was afforded an opportunity to have newly convened SSBs review his corrected records. *Id.* at 6-8.[4] Accordingly, "[t]he civilian boards for correction of military records are no less the guardians of the military promotion process after DOPMA than they were before DOPMA." *Id.* at 46.

4. Petitioner argues (Pet. 18-19, 37-38) that the court of appeals improperly deferred to factual findings in the AFBCMR's Second Addendum without first remanding the case to determine whether the Second Addendum was authentic. Petitioner points (Pet. 37-38) to a passage in the court of appeals' opinion observing that the Second Addendum rejected petitioner's allegation that the SSBs in 1993 used impermissible supercompetitive standards when recommending that petitioner not be promoted. See Pet. App. 45.

The court of appeals, however, was not deferring to any finding of fact in the Second Addendum.[5] Rather,

---

[4] For similar reasons, petitioner errs in arguing (Pet. 35- 36) that BCMRs must always void an original pass-over decision infected with error because the SSBs employ "supercompetitive" scoring procedures when comparing the officer's records to the records of other officers. Moreover, petitioner has conceded that the SSB proceedings in 1993 were free of procedural error, Pet. App. 13, 21, and petitioner does not contend that the SSBs' procedures violate the provisions of Section 628. See Pet. 18 (noting that petitioner did not cross-appeal trial court's decision that his SSBs conformed with Section 628 because he "was not concerned with whether or not a supercompetitive SSB process violated Section 628").

[5] Indeed, petitioner had conceded in the court of appeals that the 1993 SSB proceedings were free of error. Pet. App. 13, 21; Pet. 18; see also note 4, *supra*.

the court of appeals cited the Second Addendum's rejection of petitioner's allegation simply to illustrate that the BCMR is capable of deciding procedural challenges to an SSB decision without making the underlying decision whether the officer should be promoted. Pet. App. 45. Thus, as the court of appeals stated, "[t]o the extent that [it] agree[d] with any view stated in the Second Addendum, [it did] so as an independent matter of statutory interpretation." *Id.* at 47 n.2. The authenticity of the Second Addendum is therefore irrelevant to the question whether the court of appeals properly held that neither 10 U.S.C. 628 nor 1552 requires a BCMR to void an original pass-over before referring a case to an SSB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DAVID M. COHEN
ANTHONY J. STEINMEYER
JAMES M. KINSELLA
ARMANDO O. BONILLA
Attorneys

JULY 1999

Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

No. 98-1689

In the Supreme Court of the United States

GREGORY C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner's Reply to the Brief in Opposition

Guy J. Ferrante
King & Everhard, P.C.
450 Broad St., Ste. 112
Falls Church, VA 22046
(703) 241-8282
Counsel of Record

Kathleen J. St. John
Kane St. John
Of Counsel

TABLE OF CONTENTS

Page

Argument.....1

A. Petitioner Has Never Conceded that There Was an Absence of Prejudicial Error.....1

B. The Continuation of Pay in an Officer's Current Grade Does Not Constitute a "Windfall".....2

C. The Desire Not to Intrude into "Military" Matters Does Not Accord the AFBCMR Discretion to Withhold Relief Under 10 U.S.C. §1552.....6

D. Section 628(b)(2) Does Not Authorize "Relation-Back" of an SSB Non-Selection.....8

E. The Court of Appeals Did, in Fact, Rely on the Second Addendum.....10

Conclusion.....10

TABLE OF AUTHORITIES

Page

Accardi v. Shaughnessy, 347 U.S. 260 (1954).....4

Bell v. United States, 366 U.S. 393 (1961).....3

Chappell v. Wallace, 462 U.S. 296 (1983).....4

DeBow v. United States, 434 F.2d 1333 (Ct. Cl. 1970), cert. denied, 404 U.S. 846 (1971)... 8

Denton v. United States, 204 Ct. Cl. 188 (1974).....8

Doyle v. United States, 599 F.2d 984 (Ct. Cl. 1979) (en banc), cert. denied, 446 U.S. 982 (1980).....9, 10

Grieg v. United States, 640 F.2d 1261 (1981), cert. denied, 455 U.S. 907 (1982)).....4

Loving v. United States, 517 U.S. 748 (1996).....6
Ray v. United States, 453 F.2d 754 (Ct. Cl. 1972).....8
Sanders v. United States, 594 F.2d 804
(Ct. Cl. 1979).....4, 8-10
Small v. United States, 158 F.3d 576
(Fed. Cir. 1998) (petition for cert. pending).....5

2 U.S.C. § 190(g).....4
10 U.S.C § 617(a).....5
10 U.S.C. § 628.....*passim*
10 U.S.C. § 628(b)(2).....4, 5, 8, 9
10 U.S.C. § 628(b)(3).....9
10 U.S.C. § 628(d)(2).....2
10 U.S.C. § 631.....2, 3
10 U.S.C. § 632.....2, 3
10 U.S.C. § 633.....2, 3
10 U.S.C. § 634.....2, 3
10 U.S.C. § 635.....2, 3
10 U.S.C. § 1552.....*passim*
37 U.S.C. § 204.....*passim*
37 U.S.C § 206.....2

DoDD 1320.11, Definitions, ¶ 4.....4
32 C.F.R. § 865.9.....4, 6, 8
34 Comp. Gen. 7-10 (1954).....6. 7
40 Op. Atty Gen. 504 (1947).....4
OpJAGAF 1994/17.....6
H.R. Rep. No. 82-499, 82nd Cong., 1st Sess. (1951).....8
Russell O. Wheeler, *The Secretary of the Air
Force, Correction of Military Records and
the Limits of Discretion*, 7 Fed. Cir. Bar J. 193.....8

In the Supreme Court of the United States

GREGORY C. PORTER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petitioner's Reply to the Brief in Opposition

Argument

A. Petitioner Has Never Conceded That There Was an Absence of Prejudicial Error.

Pages 9-10 of the government's Brief in Opposition (U.S. Br.) states:

> As the court of appeals observed, petitioner concedes that the SSBs' decisions in 1993 not to recommend him for promotion were free of error. ... Pet. App. 13, 21; see also Pet 18. Notwithstanding his concession that the errors before the promotion boards ... were not prejudicial, petitioner seeks constructive reinstatement, back pay, and related benefits for approximately nine years.

This argument reflects a misunderstanding both of the court of appeals' observations and of the Petitioner's position. The Petitioner does not challenge his 1993 SSB non-selections because he does not seek promotion; instead, he seeks his distinct and separate remedy of back pay in his current grade. By not seeking a promotion remedy, the Petitioner has *not* conceded an absence of prejudicial error. To the contrary, throughout these proceedings, Petitioner has

maintained that his 1993 SSBs were supercompetitive and, for this reason and many others, an unfair substitute for his vested pay rights under 37 U.S.C. § 204 and 10 U.S.C. § 1552. Appellee's Br. at 7,-8, 11, 18, 29-31; Pet. Br. at 17-18, 25, 35-37.

B. The Continuation of Pay in an Officer's Current Grade Does Not Constitute a "Windfall."

The government's argument that back pay constitutes a "windfall" (U.S. Br. at 9) is unmeritorious for three reasons. First, an active duty officer's entitlement to continuing pay in his current grade is established by Congress and, hence, is not a "windfall" but a "right." Second, the government's argument ignores the importance of back pay in the system of carefully balanced rights afforded to active duty military officers. Third, SSBs cannot and do not establish "harmless error" in a back pay action.

1. Active duty officers' ***rights*** to pay in the "up or out" promotion system are defined by seven statutes: 37 U.S.C. § 204 and 10 U.S.C. §§ 628, 631, 632, 633, 634, and 635.

37 U.S.C. § 204 entitles an active duty officer who is unlawfully separated to draw pay in his *current* grade until he is properly separated.[1]

10 U.S.C. § 628(d)(2) entitles an active duty officer who meets a special selection board (SSB) to receive back pay in a ***higher*** promoted grade, provided that he is promoted.

10 §§ 631-635 create two distinct "up-or-out" schemes and define two distinct rights to continue serving on active duty. For lower ranking officers like the Petitioner active duty status may be terminated six months after the

[1] This right is implicit in and intrinsic to 37 U.S.C. §§ 204 and 206. Pet. Br. at 1-2, 20 n7.

receipt of two promotion non-selections. 10 U.S.C. §§ 631, 632. Under this scheme, if a promotion board is never convened or if, for some reason, it is voided, there is no triggering event for separation under Sections 631 or 632 and the officer continues to serve on active duty in his current grade. Promotion selection is in no way a prerequisite for continuing service; instead, voidance of a promotion passover establishes the officer's continuing active duty status.

For officers serving in or above the rank of lieutenant colonel (commander in the Navy), the right to continue on active duty is defined differently. In the case of a higher-ranking officer, the right to continue serving in one's current grade is contingent upon *selection* by a promotion board. 10 U.S.C. §§ 633, 634, and 635. Under this distinct "up or out" scheme, if a promotion board is held to be defective and void, the officer's separation from active duty is unaffected. This is because selection by a promotion board is a prerequisite for continuing service.

The government's assertion that back pay in an officer's *current* grade is a "windfall" (U.S. Br. at 9) betrays a misunderstanding of the foregoing statutory scheme. The right to continue drawing pay in one's *current* grade is separate and distinct from the right to draw pay in a *higher* grade. Moreover, for lower-ranking officers, the right to continue on active duty is not at all contingent upon SSB selection. To argue that a lower-ranking officer's constructive continuation on active duty produces a windfall in the absence of a promotion selection is a repudiation of the distinct statutory rights that *Congress* has guaranteed to officers in the lower ranks.[2]

---

[2] Cf. Bell v. United States, 366 U.S. 393 (1961) (traitor held entitled to statutory pay based on active duty status).

2. In addition, the government's windfall argument ignores the importance of back pay in a system of rights in which servicemembers' individual rights of action are strictly curtailed. The statutory right of pay is one of the very few legal rights that active duty officers are permitted to assert against their Service. Indeed, these back pay rights are assured to officers in lieu of many other rights that civilian Americans freely enjoy. See, e.g., 2 U.S.C. § 190(g) (servicemembers denied the right to petition Congress for record corrections); 40 Op. Atty Gen. 504 (1947) (Congress' authority to issue new discharges triggering back pay transferred to the BCMR in 10 U.S.C. § 1552); Chappell v. Wallace, 462 U.S. 296, 303 (1983) (servicemember denied Bivens remedy because of availability of back pay remedy under Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979) and Grieg v. United States, 640 F.2d 1261 (1981), cert. denied, 455 U.S. 907 (1982)).

3. A third flaw in the government's "windfall" argument is that military SSBs do not establish "harmless error." Section 1552(a) authorizes Service Secretaries, acting through *civilian* boards, to correct military records. 32 C.F.R. § 865.9 (set forth in Pet. Br. at 13) establishes that "probable material error" is one of the elements of a correction claim that must be decided by the BCMR. DoDD 1320.11, Definitions, ¶ 4 (set forth in Pet. Br. at 10) establishes that military SSBs do not advise the BCMR about whether there was "harmless error." See also Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954) (when a decision is entrusted to the discretion of a board, the board cannot substitute another's judgment for its own).

Unlike the BCMR, which has full knowledge of the facts in an applicant's case and is charged with rendering justice in individual cases (10 U.S.C. § 1552(a)), an SSB has a limited record (10 U.S.C. § 628(b)(2)) and is charged with meeting

the needs of the military department (10 U.S.C. § 617(a); Pet. App. 141, 146). Typically, an applicant meets an SSB with a significant gap in his record. (Petitioner's top OER, representing a quarter of his career, was omitted when he met his first 1993 SSB). Although SSB members may not discriminate against an applicant who has record gaps, neither do they have any basis for compensating for such gaps. Under 28 U.S.C. § 628(b)(2), SSB members are limited to review of an officer's record as it would have appeared to the original board in the absence of error. They know nothing about the circumstances that prompted correction of the candidate's record. They have no idea whether the officer's performance during the record gap was comparable to that of the comparison benchmark candidates whose records are before them. In short, although the SSB process is deemed fair for the purpose of vindicating a non-right to promotion, it is not a substitute for the deliberative process used by the BCMR to determine officers' vested pay rights under 37 U.S.C. § 204.

The government's argument is further undermined by its admission in open court (Pet. App. 170-87) and the trial court findings (Pet. App. 52-53 n4, 74, 74 n18, 92 n4) that the Air Force's SSBs are supercompetitive (i.e., more competitive than the original promotion boards). The only "evidence" in this case to the contrary is an unsupported, ex parte, post hoc statement in the Second Addendum, which, as Petitioner has pointed out, not only appears to have illegally and fraudulently issued[3], but is also contradicted by the government's own internal records (Pet. App. 164-65, 168-69).

---

[3] As demonstrated in Porter's conditional motion for remand (Pet. App. 148-169) and the Addendum attached to Porter's principal appellate brief, the AFBCMR has a long history of such fraud in its proceedings.

In sum, what the Air Force seeks is to exchange active duty officers' vested pay rights under 37 U.S.C. § 204, their constitutional right to petition Congress, their right under 10 U.S.C. § 1552 to redress in the civilian BCMR, and various other rights, for the *burden* of engaging in years of burdensome litigation against the United States Justice Department in an attempt to reform a broken SSB process.[4] Even if that litigation were to succeed, the result would be a system in which the military is the sole and exclusive arbiter of its own errors and injustices and has no economic incentive to afford just and prompt relief. By fighting against this scheme, Air Force officers are not seeking a "windfall."

C. The Desire Not to Intrude into "Military" Matters Does Not Accord the AFBCMR Discretion to Withhold Relief Under 10 U.S.C. § 1552.

The government does not respond to the Petitioner's point of error that the AFBCMR's use of an "egregious error" standard violates 32 C.F.R. § 865.9 (set forth in Pet. Br. at 13). Instead, it seeks to reframe the issue in terms of the Secretary's and the AFBCMR members' discretion to withhold relief so as to avoid involvement in "military" matters. U.S. Br. at (I) (Question Presented), 10-11. This approach is misguided for several reasons.

First, involvement in "military" matters is a BCMR's *raison d'être*. Pursuant to Section 1552, the Secretary of the

[4] The difficulty of such litigation is demonstrated by Small v. U.S., 158 F.3d 576, 581 (Fed. Cir. 1998) (petition for cert. pending). In 1991, Major Small commenced a challenge against the Air Force promotion board process on the ground that the majority of promotion board members sign a blank board report with no knowledge of the board's deliberations or results. The court of appeals held that federal law "does not require that a majority determination be based on a knowing review and conscientious consideration of each officer's record."

Air Force and the members of the AFBCMR involve themselves deeply in "military" matters on a regular basis. For example, the evaluation of a military officer is a purely military function. Yet this case is a prime example of the AFBCMR's willingness to intervene in such matters. Pet. App. 109. Moreover, so entrenched is the AFBCMR's involvement in "uniquely military matters" that it has, on occasion, directed that officers be promoted on its record-correction authority – without that officer being recommended by any promotion board convened under Title 10." See OpJAGAF 1994/17 (attached to letter by Kathleen St. John to Clerk, Court of Appeals, dated May 14, 1998).

Under Section 1552(a), the responsibility to correct military records devolves to the Secretaries of the Military Departments acting through boards composed of executive members of their departments. Courts defer to the BCMR because of their expertise in "military" matters, which courts lack.[5] It defies all logic (and is contrary to historical practice) for the government to turn around and say that the Secretary of the Air Force and his subordinate executive members, who exercise oversight responsibility over all of the Air Force's military functions, may not become involved in "military" matters in the AFBCMR

Furthermore, the government incorrectly suggests that the BCMR is not mandated to grant full monetary relief. U.S. Br. at 11. In the 1950's, Congress' recent delegation of its legislative authority to BCMRs ignited a constitutional controversy in military circles. At the heart of this controversy was the concern that there were no standards in 10 U.S.C. § 1552(c) governing the Secretary's discretion to award back pay, in violation of the separation of powers and

---

[5] As the government correctly notes, BCMR cases are reviewed using the "arbitrary and capricious" standard. U.S. Br. at 2.

non-delegation doctrines. Cf. Loving v. United States, 517 U.S. 748, 770 (1996) (Congress must provide "intelligible principles" to guide executive in exercise of discretion). In order to protect Section 1552 from constitutional challenge, the Comptroller General opined in 1954 that servicemembers must be awarded the payment that "would have been due if the error or injustice had not existed originally." 34 Comp. Gen. 7-10 (1954). In 1972, this view was reaffirmed in Ray v. United States, 453 F.2d 754, 756 (Ct. Cl. 1972). Accord, Sanders, supra, 594 F.2d at 813; Denton v. United States, 204 Ct. Cl. 188 (1974); DeBow v. United States, 434 F.2d 1333 (Ct. Cl. 1970), cert. denied, 404 U.S. 846 (1971); H.R. Rep. No. 82-499, 82nd Cong., 1st Sess. (1951) ("if military and naval personnel have been improperly aggrieved as a result of an error beyond their control, the payment of any sums of money, regardless of the amount, is merely collateral to the correction of the injustice.") See also Russell O. Wheeler, *The Secretary of the Air Force, Correction of Military Records and the Limits of Discretion*, 7 Fed. Cir. Bar J. 193, 204-215.

In addition, 32 C.F.R. § 865.9 (1992) (set forth in Pet. Br. at 13) limits any discretion by the Board to deny a record correction request:

> The Board may deny an application if it determines that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice, that the applicant has not exhausted other effective administrative or legal remedies available to him or her, that effective relief cannot be granted, or that the applicant did not file his or her application within 3 years after he or she discovered or reasonably could have discovered the alleged error or injustice . . . .

D. Section 628(b)(2) Does Not Authorize "Relation-Back" of an SSB Non-Selection

Prior to Porter, it was understood that 1) an officer was entitled to pay in his current grade until properly separated, Sanders, supra, 594 F.2d at 510; 2) that promotions accomplished through specially-convened promotion boards related back, Doyle v. United States, 599 F.2d 984, 1000 (Ct. Cl. 1979) (en banc), cert. denied, 446 U.S. 982 (1980); and 3) that non-selections by special boards did **not** relate back, ibid. Acting within this jurisprudential framework, Congress enacted 10 U.S.C. §§ 628(b)(3) and (d)(2). Subsection (d)(2) addresses SSB promotions and expressly makes them retroactive; subsection (b)(3) addresses SSB nonselections gives them **no** retroactive effect.

The government ignores both of those subsections, and contends that another provision, subsection 628(b)(2), requires relation back of SSB nonselections. U. S. Br. at 9. This contention lacks merit. 10 U.S.C. § 628(b)(2) merely requires the SSB to consider the "record of the officer as his record, if corrected, would have appeared to the board that [originally] considered him." This statutory provision is completely unremarkable and implies no relation back of an SSB non-selection--especially when Subsection (b)(3) gives no such effect. *Of course*, SSBs should examine records as they would have appeared to the original board without error in the original proceeding. Would there be any sense in allowing SSBs to examine the uncorrected records that caused the problem in the first place? Subsection (b)(2)'s plain purpose is to define the record that is reviewed by an SSB; it is not to overrule Sanders and Doyle, to eliminate substantive pay rights under 37 U.S.C. § 204, or to detract from the plain language of Subsection (b)(3).

E. The Court of Appeals Did, in Fact, Rely on the Second Addendum.

The government maintains that the central issue herein is the AFBCMR's discretion to grant SSB consideration in lieu of a military back pay remedy. U.S. Br. at (I). Petitioner maintains that this issue cannot be resolved without addressing whether it was an abuse of discretion to substitute a super-competitive SSB standard for the "probable material error" standard set forth in the AFBCMR's regulations.

The Air Force admitted and the lower court found that the Air Force's SSBs are supercompetitive (Pet. App. 52-53 n4, 74, 74 n18, 92 n4, 170-87). The court of appeals' only response to this untidy fact was to repeat unsupported, disproved, ex parte, post hoc, and ostensibly fraudulent statements in the Second Addendum. Pet. App. 45. Certainly, there is sufficient error in this case to reverse and render without ever considering the fraudulent nature of the Second Addendum; it is incorrect to argue, however, that the court of appeals decision was unaffected by fraud.

Conclusion

The petition for writ of certiorari should be granted.

August 2, 1999

Respectfully submitted,
Guy J. Ferrante
King and Everhard, PC
450 W. Broad St., Ste. 112
Falls Church, VA 22046
(703) 241-8282
Counsel of Record

Kathleen J. St. John
Kane St. John
Of Counsel